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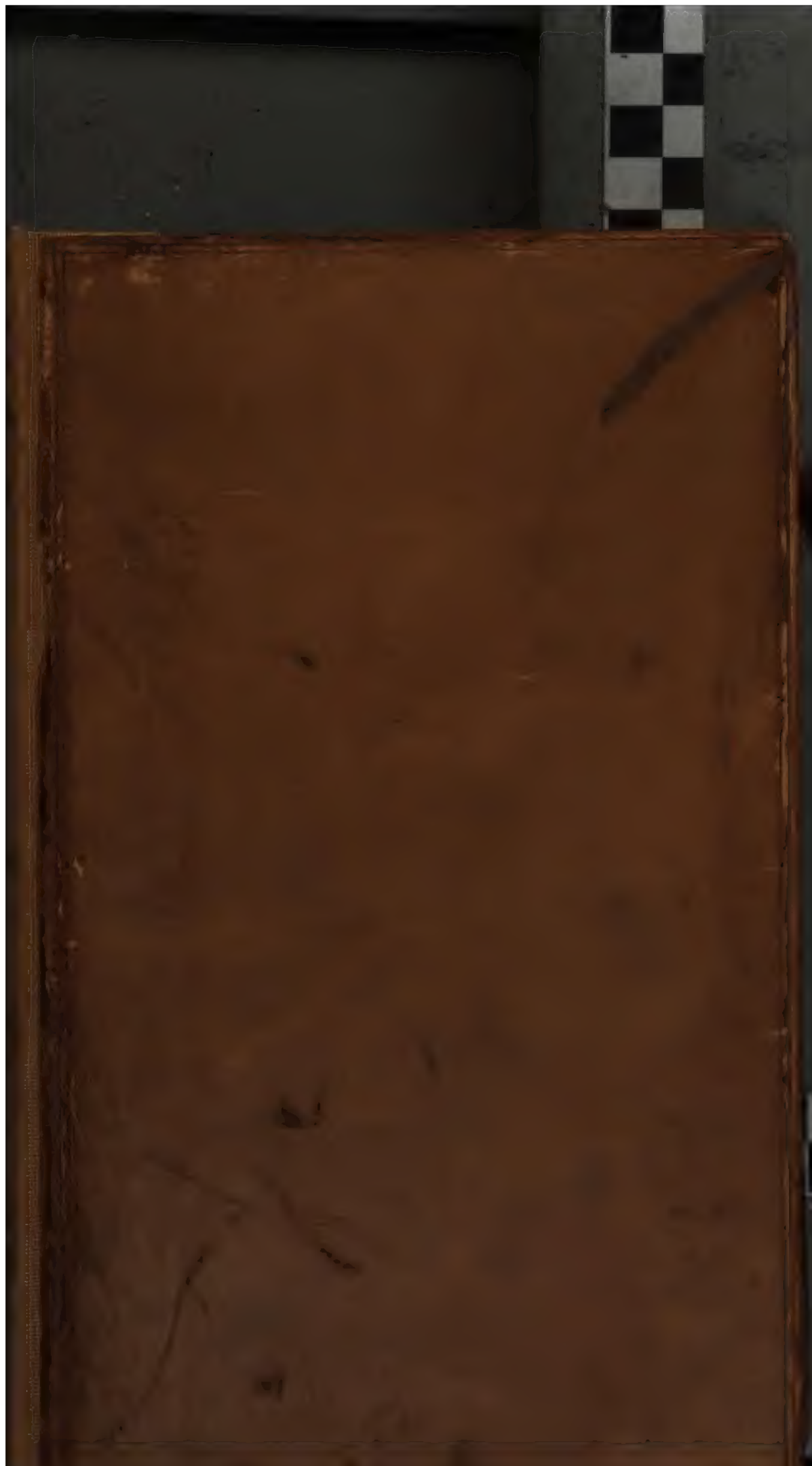
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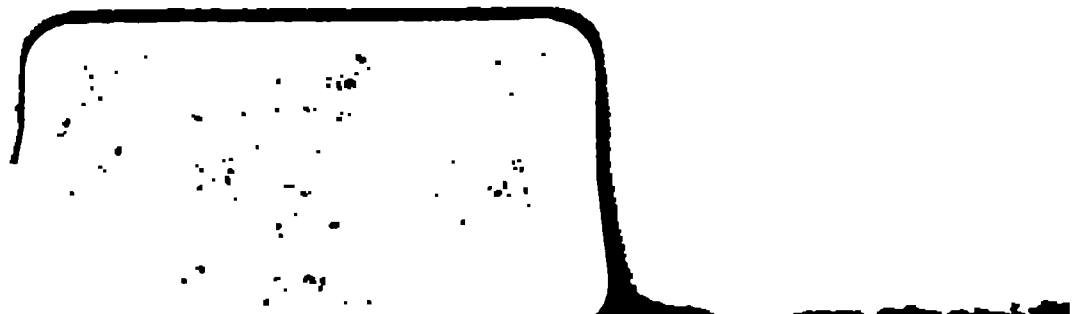
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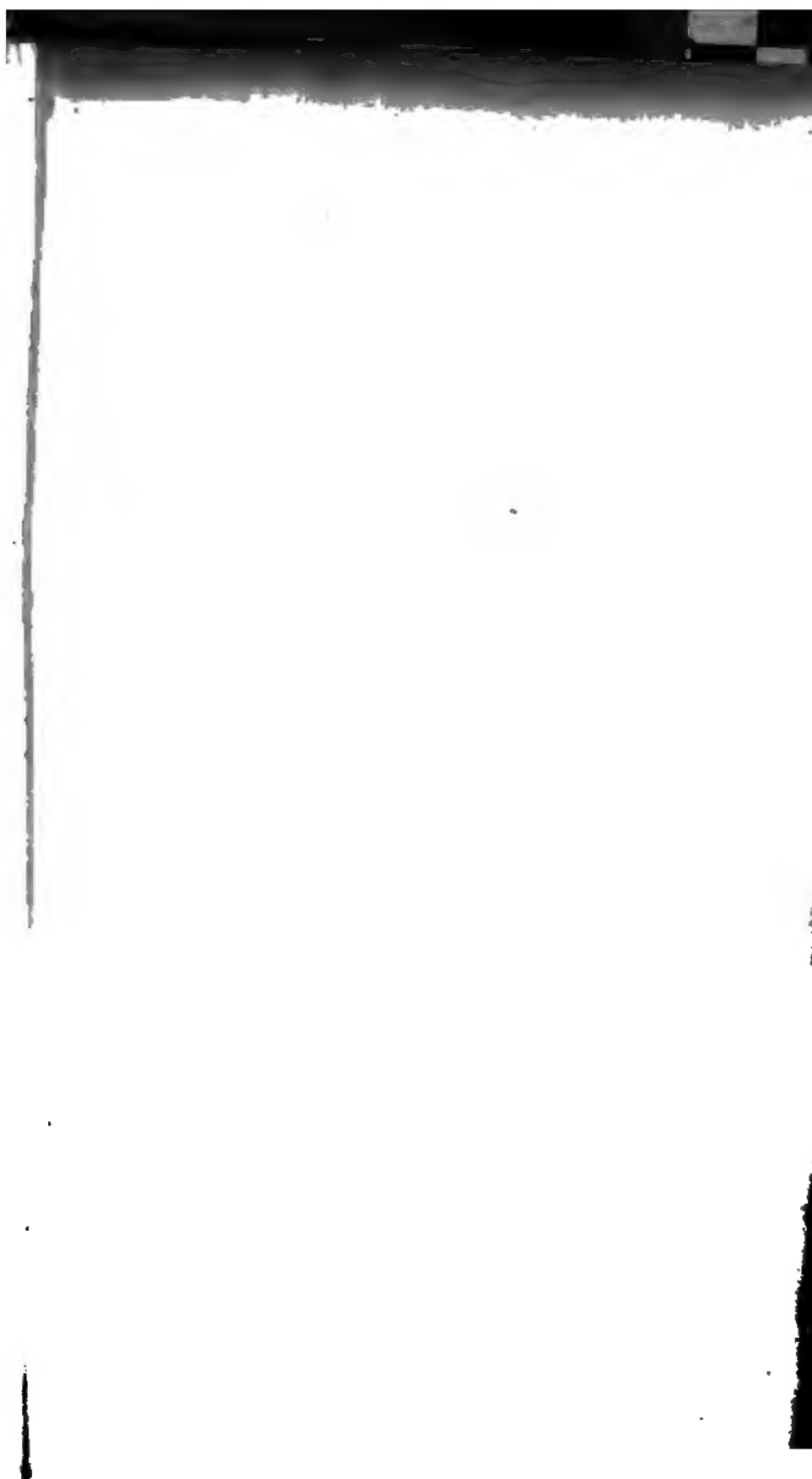
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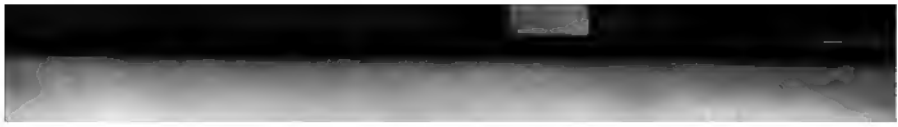
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R E P O R T S
OF
CASES
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY
DURING THE TIME OF
Lord Chancellor Brougham.

By JAMES RUSSELL, AND J. W. MYLNE, Esqs.
BARRISTERS AT LAW.

VOL. II.
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LORD BROUGHAM, *Lord High Chancellor.*

SIR JOHN LEACH, *Master of the Rolls.*

SIR LANCELOT SHADWELL, *Vice-Chancellor.*

SIR THOMAS DENMAN, *Attorney-General.*

SIR WILLIAM HORNE, *Solicitor-General.*

A

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REPORTS

OF

CASES

ARGUED & DETERMINED

IN THE

HIGH COURT OF CHANCERY.

1831.

TATHAM *v.* WRIGHT.

1830.
Nov. 18.

1831.
April 29, 30.

May 11.
Nov. 25.

THE bill was filed by the heir at law of *John Marsden* against the persons who took interests under a will of *John Marsden*, dated the 14th of *June* 1822, and a codicil to it dated the 23d of *February* 1825. The case stated by the Plaintiff was, that the testator had been, from his youth upwards, weak, childish, and incapable of transacting business; that, for more than twenty years before his death, he had been entirely under the control of his agent and steward, the Defendant *George Wright*;

A motion for a new trial of two issues, was made upon three grounds: 1st. the alleged improper summing up of the Judge; 2dly, because the weight of

that evidence was against the verdict; and, 3dly, because only one of the attesting witnesses was examined at the trial. The motion was refused on the ground, that, upon the evidence alone, without regard to the summing up of the Judge, the Court would not have been satisfied, if the jury had given a different verdict; and because the two attesting witnesses, who were not examined, were present in Court on the trial of the issue, and tendered to the party moving for a new trial, who declined to examine them.

Semble. The rule is not universal, that, on the trial of an issue *devisavit vel non*, all the attesting witnesses must be examined at law.

Semble. That rule does not apply, where the bill is filed by the heir at law, to restrain the devisee from setting up a legal estate as a bar to the ejectment.

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that the will and codicil had been prepared by *Wright's* direction; and that *Marsden*, without comprehending the provisions of these instruments, which were extremely complex and artificial, executed them under *Wright's* control and influence. The prayer was, that the will might be declared to have been obtained by fraud and undue influence, and to be void.

The bill also alleged that the legal estate in *Marsden's* freeholds was outstanding, and prayed that the Defendants might be restrained from setting up any outstanding legal estate as a defence to any action at law which the Plaintiff might commence. The Defendants by their answer stated that a considerable part of the freeholds was vested in mortgagees, but they could not further set forth whether the legal estate of any part of the testator's lands was outstanding.

Many witnesses were examined in the cause, both on the part of the Plaintiff and on the part of the Defendants. Among those who were examined for the Defendants were Mr. *Bleasdale*, the Rev. *Robert Procter*, and *Edward Tatham*, the three attesting witnesses to the will and codicil. Mr. *Bleasdale* was the attorney who prepared the will, and had known the testator from his infancy. He deposed in the most unequivocal manner to the perfect capacity of the testator to dispose of his property, — to the due execution of the will and codicil, — to their strict conformity to the testator's instructions and wishes, — and to his perfect understanding of their import and effect.

Procter, in his examination in chief, stated that, at the time of the "execution of the will and codicil, *John Marsden* was of great imbecility of mind and of weak understanding, but his memory was good on the few subjects

subjects upon which he conversed; and that he was capable of making a plain straight-forward will or codicil to a limited extent." On his cross-examination he said that, "in his opinion and belief, *John Marsden* was totally incompetent to transact any business, or to manage his own affairs or property, or to give any proper directions or orders about the same; that he never was capable of knowing his own property, either as to extent or value, or of buying or selling, or contracting for any thing more than ten or twenty shillings in amount, or of giving instructions for any conveyances or leases; that he was totally incapable of giving directions for making calculations of the respective values of different lands, or of understanding in the least degree such calculations when made; that *John Marsden* had not the power to follow his own inclinations, or to act as he wished, without the restraint or control of the Defendant *George Wright*, in matters of consequence, and that he had not a will of his own in such matters; that he did not think *John Marsden* was capable of giving written instructions or directions for his will to *Giles Bleasdale*, or to any other person; and that, in his opinion, *John Marsden* was not capable of comprehending, combining together, and judging accurately of the nature and consequences of any legal instrument creating a variety of new rights and interests."

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Edmund Tatham in his examination in chief stated, that *John Marsden* was "of weak mind and deficient understanding, but was of sufficiently sound and disposing mind, memory, and understanding to make a plain and simple will or codicil, though not to make an intricate or complicated will or codicil." In his cross-examination he deposed "that *John Marsden* was of a weak mind and defective judgment; that he was infirm in these respects throughout the whole of the period

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of the witness's acquaintance with him, up to the time of his last illness, which was after the year 1825; that he was liable to be made the dupe of designing and interested persons; that he was not capable of transacting business, or of managing his own affairs or property, or of giving proper instructions or orders about the same; that he was not capable of comprehending, combining together, or judging accurately of the nature and consequence of any legal instrument creating a variety of new rights and interests; and that he seemed to be afraid of offending *Wright*." Both these witnesses entered, in their cross-examination, into minute details of circumstances to corroborate their opinions of the extreme imbecility of Mr. *Marsden*.

Two issues of *devisavit vel non* were directed.

On the trial, the devisees, who were Plaintiffs in the issues, called only *Bleasdale* to prove the due execution of the will and codicil, and did not examine either *Procter* or *Tatham*; but their counsel stated, that they had served *subpœnas* on both these persons; that both of them were in Court, and the Defendant might examine them if he pleased. The Defendant did not call them.

The issues were tried at *York* before Mr. Justice *Park*: the jury found a verdict in favour of the will and codicil, and the Judge was satisfied with the verdict.

A motion for a new trial was now made on behalf of the heir.

Mr. *Brougham* and Mr. *Duckworth*, for the motion.

Mr. *Bickersteth*, Mr. *Frederick Pollock*, and Mr. *Walker*, *contra*.

In

In support of the motion it was contended, 1st, that the Judge, in summing up, had not presented the evidence fully and fairly to the jury; 2dly, that the verdict was not supported by the evidence; and 3dly, that the Plaintiffs in the issues were bound to have examined all the three attesting witnesses.

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The argument on the first two points consisted of a commentary on the evidence of the witnesses who had been examined on the trial, and of criticisms on the observations made by the Judge.

On the third point it was contended, on behalf of the heir, that, on the trial of an issue of *devisavit vel non*, it was imperative on the party claiming under the will to examine all the three attesting witnesses. *Townsend v. Ives* (a), *Ogle v. Cook* (b), *Bullen v. Michel* (c), *Bootle v. Blundell*. (d) The only exception from this rule was, when the circumstances were such, that, by the common rules of evidence, proof of the witness's handwriting might be substituted for the testimony of the witness himself; as when the witness was dead, or was abroad, or was insane, or after diligent search could not be found: and it was to cases of this description that Lord *Thurlow* referred, when, in *Powel v. Cleaver* (e), he expressed a doubt, "whether the rule had ever been laid down so largely, that a will could not be proved without examining all the witnesses, although the practice had been to examine all."

On the other hand, the devisees contended that the rule, requiring all the attesting witnesses to be examined, applied only where the devisees came into a court of equity to have the will established. In the present case they

(a) 1 *Wilson*, 216.

(b) 1 *Ves. sen.* 178.

(c) 2 *Price*, 399.

(d) 19 *Ves.* 494. *Cooper*, 136.

(e) 2 *Bro. C. C.* 504.

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(c) 2 *Price*, 399.

(d) 19 *Ves.* 494. *Cooper*, 156.

(e) 2 *Bro. C. C.* 504.

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they did not ask the assistance of the Court: they asked for no decree, except that the bill should be dismissed. The Plaintiff in the suit had transferred the jurisdiction from a court of law to a court of equity, merely on the ground that outstanding legal estates might be set up to defeat any action which he might bring to recover possession: and, on the trial of an issue directed under such circumstances, it was sufficient to prove the will in the same way as it would have been proved in case he had brought an ejectment. Even if the bill had been filed by the devisees to have the will established, instead of being filed against them to have the will declared void, it would not have been incumbent on them, under the special circumstances of the case, to examine *Procter* and *Tatham*. Those persons, in their depositions in the cause, had given evidence against the validity of the will and codicil which they had solemnly attested; it would be absurd to consider them as the witnesses of the devisees, and unreasonable to require that they should be called by the parties against whom it was known they would depose. The rule was not inflexible and invariable: it would not be followed, where its observance would tend to render the result less satisfactory to the conscience of the Court. The interests of truth plainly required that *Procter* and *Tatham*, if examined at all, should be examined as the witnesses of the heir, and that the adverse party should have the power of cross examining them. The heir might have examined them at the trial: he did not choose to do so; and a new trial would not be directed merely to give him an opportunity of doing what (if his counsel had deemed it prudent) he might have done before.

The MASTER of the ROLLS.

This is a motion for a new trial of two issues which have been directed by the Court in order to determine the validity of a will and codicil.

The

The motion is made upon three grounds: first, the improper summing up of the learned Judge; secondly, that it was a verdict against the weight of evidence; and thirdly, that one only of the three attesting witnesses has been examined at law. It appears that the other two attesting witnesses were present in court at the trial of the issues, and were tendered by the Plaintiffs in the issues, to the Defendant for examination, but that his counsel declined to examine them.

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I have carefully read every word of the report of the learned Judge, but have purposely abstained from reading the short-hand writer's notes of the summing up, in order that my judgment might be formed upon the evidence alone. Considering that this testator throughout the course of a long life had been received in the world as a person capable of legal contracts, and had entered into pecuniary engagements by borrowing money and by purchase and sale of property to a very large amount, and considering the description of witnesses who have been respectively examined on both sides, and the opportunities they repeatedly had of acquiring an accurate knowledge of the state of the testator's understanding, and comparing the nature of the testimony given by the respective witnesses, — I am clearly of opinion that the weight of evidence is in favour of the competence of the testator, and that the jury have come to a sound conclusion on the subject.

As this opinion is formed without any reference to the summing up of the learned Judge, and as I should have considered it my duty to direct a new trial upon the evidence alone, whatever the summing up had been, if the jury had come to a different conclusion, it is not necessary to take any notice of the observations which have been made in that respect.

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The effect of establishing a will in this Court is to conclude all future questions respecting its validity; and the caution of this Court requires, therefore, before a will be established upon evidence here, that all the attesting witnesses shall be examined. If this Court requires the aid of a court of law, and the intervention of a jury, to determine the validity of a will, it does not necessarily follow that a court of law must in such a case depart from its own rules and adopt those of a court of equity. When all the witnesses are not examined in the court of law, and the cause comes on for further directions in a court of equity, there may be cases in which a court of equity, referring to its own principles, may not have its conscience fully satisfied by the verdict of the jury:— as, for instance, where, the general competence of the testator being admitted, the question depends on the competency at the particular time of executing the will. There the attesting witnesses being the persons who can give the best testimony as to the special fact, it may be reasonable in the court of equity to send the case back, in order that all the witnesses may be examined. But when, as in the present case, the question depends not upon the particular state of the testator's mind at the making of the will, but upon his general competency throughout a long life, the attesting witnesses to the will may not be persons capable of speaking to the fact of general competency, and not, therefore, the most material witnesses in the consideration of a court of equity.

It is further to be observed, that the bill filed in this case is not by the devisees to establish the testamentary instrument, but it is a bill by the heir at law claiming against these instruments, to have a legal estate put out of his way, in order that he may try the validity of these instruments by ejectment, and no decree in this cause

would

would be conclusive upon the question of the validity of the will. The plaintiff might, by redeeming the mortgage, get in the outstanding legal estate by an assignment of the mortgage; or even upon the hearing upon further directions, he might still contend that he ought not to be concluded by the trial of the issues, and that the court of equity should still permit him to proceed by restraining the Defendants from opposing to him the legal estates.

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It is not, however, for the present purpose, necessary to advert to these distinctions. The complaint that the two other witnesses were not examined, is made by the heir to whom they were tendered, who had full opportunity of examining them, but thought fit to decline that examination. He declined it, because he wished to have the technical advantage, which by the rules of law results from considering those persons witnesses of his opponent. Can he, therefore, with effect say that it must be inferred that the witnesses, if examined, could have given evidence in his favour, when it was his own choice that such evidence should not be laid before the Court?

The motion for a new trial must, therefore, be refused.

The Plaintiff moved before the Lord Chancellor for a new trial of the issues.

His Lordship having been counsel on the trial of the issues, and on the application for a new trial to the Master of the Rolls, requested the assistance of the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron: and the motion was heard before the Lord Chancellor, Lord Chief Justice *Tindal*, and Lord *Lyndhurst*.

Sir

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TATHAM

v.

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April 29, 30.

Sir *J. Scarlett* and Mr. *Armstrong*, who supported the motion, and Mr. *F. Pollock* and Mr. *Tomlinson* who opposed it, in commenting upon the nature and effect of the evidence, and the manner in which the case had been left to the jury by the presiding Judge, pursued the same general line of argument which had been previously taken at the Rolls: but the third point, which involved the question how far the rule was imperative, that upon an issue of *devisavit vel non* all the attesting witnesses should be examined, stood over to a subsequent day for the purpose of being argued separately by a single counsel on each side.

May 11.

The *Solicitor-General* in support of the application now contended, that, both upon general principles and upon the special circumstances of the case, all the attesting witnesses ought to have been examined, and that, inasmuch as the devisees, whose duty it was, as Plaintiffs in the issue, to set up the will, had declined to examine them, a new trial must be directed of course, the former having miscarried. The sole object of granting such an issue, was to satisfy the conscience of the Court upon a question respecting which, from the imperfect mode of taking evidence in equity, no sound judgment could be formed without resorting to the aid of a court of law. That course, however, would be an idle mockery, if the dexterity of an advocate, or the technical rules of *Nisi Prius* practice were suffered to defeat the ends of justice; and those ends were only to be attained by subjecting to a full and searching *viva voce* examination all the individuals whose testimony could throw light upon the points referred to the determination of the jury. The rule, therefore, was imperative and universal that upon the trial of an issue of *devisavit vel non*, all the subscribing witnesses, if alive and of sound mind, and resident within the jurisdiction, ought to be examined: and

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no distinction in this respect had ever been suggested between cases where the devisees were Plaintiffs in equity seeking to establish the will against the heir, and cases where they were Defendants resisting his attempts to impeach it. *Bootle v. Blundell*. (a) In *Winchilsea v. Wauchope* (b), where the bill was filed by the heir, and the question turned solely upon the due execution of the will, it was one of the arguments urged in favour of the new trial which was eventually directed, that two only of the attesting witnesses had been called at the former trial. In *Lowe v. Jolliffe* (c), upon an issue out of Chancery tried at bar, the examination of all the subscribing witnesses appears to have been required, although the effect of their evidence was strongly to impugn the validity of the instrument which they had themselves attested.

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Independently of the general rule, there were circumstances which, in this case, rendered a second trial peculiarly necessary. The issues had not been directed as a mere matter of course, but the judicial attention of the Court had been pointedly drawn to them. All the attesting witnesses were examined in equity, and two of them, Messrs. *Procter* and *Tatham*, were very fully cross-examined by the Plaintiff, the heir at law. The result of their cross-examination went a great way towards shewing that the testator was utterly incompetent to make a complicated will like the one in question; and the Court would never, in the face of that evidence, and without having the matter sifted to the bottom, declare itself satisfied with the verdict, especially in a case where, in consequence of the outstanding terms, the order dismissing the bill might conclude

(a) 19 Ves. 494. *Cooper*, 136.

(c) 1 W. Black. 365.

(b) 3 Russ. 441.

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clude the parties, and be tantamount to a formal decree establishing the will against all the world. In fact, the result of the trial at law, instead of being more satisfactory than the previous investigation here, was infinitely less so; for the important evidence of two of the attesting witnesses had been purposely withdrawn; and the finding of the jury, therefore, rested mainly on the testimony of the third witness, the only one whom the Plaintiffs at law thought it proper or prudent to call; although, as all the three equally attested the will, and that instrument constituted the title which the devisees were bound to prove, they were, in truth, the witnesses of the devisees, and it was incumbent upon them, and not upon the heir, to examine them.

Sir *E. Sugden*, who appeared on the other side, was not called upon to argue the point.

June 11.

Lord Chief Justice *Tindal*, on behalf of himself and the Lord Chief Baron, read the following judgment: —

The application to this Court for a new trial of the issue, which was directed in this case, has been made upon two grounds; first, that, by the rule of this Court, it was incumbent on the Plaintiff, who supported the validity of the will, to call all the subscribing witnesses to the will; and that, inasmuch as he called one only, this Court will not be satisfied with a verdict setting up the will; and, secondly, that upon the evidence given in the cause, the verdict for the Plaintiff ought not to be satisfactory to the Court.

If there is any general rule in this Court, that, in all cases, and under all circumstances, the Plaintiff in an issue on the question, *devisavit vel non*, has the duty cast upon him of making the three attesting witnesses to the

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the will, his own witnesses upon the trial of the issue, if alive, or in a condition to give evidence, there would be no necessity for discussing the second ground of the motion; for, in the present case, two of the subscribing witnesses, who were alive and actually present in Court under the *subpœna* of the Plaintiffs in the issue, were not called as witnesses at the trial.

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It may be taken to be generally true, that in cases where the devisee files a bill to set up and establish the will, and an issue is directed by the Court upon the question, *devisavit vel non*, this Court will not decree the establishment of the will, unless the devisee has called all the subscribing witnesses to the will, or accounted for their absence. And there is good reason for such a general rule. For as a decree in support of the will is final and conclusive against the heir, against whom an injunction would be granted, if he should proceed to disturb the possession after the decree, it is but reasonable that he should have the opportunity of cross-examining all the witnesses to the will, before his right of trying the title of the devisee is taken from him. In that case, it is the devisee who asks for the interference of this Court, and he ought not to obtain it until he has given every opportunity to the heir at law to dispute the validity of the will. This is the ground upon which the practice is put in the cases of *Ogle v. Cooke* (a), and *Townsend v. Ives*. (b) But it appears clearly from the whole of the reasoning of the Lord Chancellor in the case of *Bootle v. Blundell* (c), that this rule, as a general rule, applies only to the case of a bill filed to establish the will, (*an establishing bill*, as Lord Eldon calls it in one part of his judgment), and an issue directed by the Court

(a) 1 Ves. sen. 178.

(c) 1 Mer. 193. Cooper, 136.

(b) 1 Wils. 216.

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Court upon that bill. And even in cases to which the rule generally applies, this Court, it would seem, under particular circumstances, may dispense with the necessity of the three witnesses being called by the Plaintiff in the issue. For, in *Lowe v. Jolliffe* (a), where the bill was filed by the devisees under the will *, and an issue, *devisavit vel non*, was tried at bar, it appears from the report of the case that the subscribing witnesses to the will and codicil, who swore that the testator was utterly incapable of making a will, were called by the Defendant in the issue, and not by the Plaintiff; for the reporter says, “to encounter this evidence, the Plaintiff’s counsel examined the friends of the testator who strongly deposed to his sanity;” and, again, the Chief Justice expressed his opinion to be, that all the Defendant’s witnesses were grossly and corruptly perjured. And after the trial of this issue the will was established. In such a case, to have compelled the devisee to call these witnesses, would have been to smother the investigation of the truth.

Now, in the present case, the application to this Court is not by the devisee seeking to establish the will, but by the heir at law, calling upon this Court to declare the will void and to have the same delivered up. The heir at law does not seek to try his title by an ejectment, and apply to this Court to direct that no mortgage or outstanding terms shall be set up against him to prevent his title from being tried at law, but seeks to have a decree in his favour, in substance and effect to set aside the will. This case, therefore, stands upon a ground directly opposed to that upon which the cases above referred


(a) 1 *W. Black.* 365.

* So it appears by reference to the Registrar’s book. Reg. Lib. B. 1761. fo. 130.

referred to rest. So far from the heir at law being bound by a decree which the devisee seeks to obtain, it is he who seeks to bind the devisee, and such is the form of his application, that if he fails upon this issue, he would not be bound himself. For the only result of a verdict in favour of the will would be, that the heir at law would obtain no decree, and his bill would be dismissed, still leaving him open to his remedies at law. No decided case has been cited, in which the rule has been held to apply to such a proceeding; and, certainly, neither reason nor good sense demands that this Court should establish such a precedent under the circumstances of this case. If the object of the Court, in directing an issue, is to inform its own conscience by sifting the truth to the bottom, that course should be adopted with respect to the witnesses, which, by experience, is found best adapted to the investigation of the truth. And that is not attained by any arbitrary rule, that such witnesses must be called by one, and such by the other party; but, by subjecting the witnesses to the examination in chief of that party, whose interest it is to call him, from the known or expected bearing of his testimony, and to compel him to undergo the cross-examination of the adverse party, against whom his evidence is expected to make.

In the present case, *Mr. Procter* and *Mr. Edmund Tatham*, two of the subscribing witnesses to the will, had been examined in this Court, and their depositions were known to both parties. It was well known, that, if called by the devisee, they would state in effect "that the testator was, at the time of signing and publishing the will, of weak mind and deficient understanding, though of good memory; that he was of sufficient mind to make a plain and simple disposition of his property, but not an intricate will like the present."

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The real question is, whether these witnesses are to be believed upon this evidence in contradiction to their own solemn act in the attestation of the will and codicil. That is the problem to be solved. At the time they are put into the witness-box it is known their evidence is in favour of the heir at law, and entirely subversive of the will. What questions, then, can the devisee wish to put to them, other than such as call upon them to explain and account for their solemn attestation of these instruments? And those are questions which can arise upon cross-examination alone. He would wish to ask *Mr. Procter* what could induce him to attest the execution of the will in 1822 and the codicil in 1825, if such was his opinion of the intellect of the testator? Upon what ground he had been the attesting witness to two former wills which had been successively destroyed, and the depositary of the duplicates of each in succession, at the request of the testator, down to the hour of his death? Whether he had not lived in habits of intimacy with *Mr. Marsden*, and treated him always as a man of understanding and sense? Whether he had not, upon a former occasion, lent money to *Mr. Marsden* on his bond and received payment from him, thereby treating him as a man capable of binding himself, and of managing his own affairs? And similar questions would be proposed to *Mr. Tatham*. It is obvious that if the devisee should be compelled on the trial of this issue to make those witnesses his own, the effect would be to shut out instead of discovering the truth; for after the formal examination in chief to which alone they could be subjected, the heir at law would take care not to ask them a single question.

It is further to be observed, that in the present case there is the less necessity for calling all the subscribing witnesses to the will, as no question arises upon the facts

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facts attending the execution of the will, or the compliance with the requisites of the statute of frauds. There is nothing peculiarly within the knowledge of these witnesses, nor any point to which they could be examined, which is not common to the other witnesses called to depose to the state of the testator's understanding. Upon the ground, therefore, that there is no rule in this Court which calls upon the devisee to bring forward all the subscribing witnesses to the will, where the heir at law files the bill, — as also upon the ground that, where the subscribing witnesses contradict the effect of their own attestation, it would not be unreasonable to dispense with the rule, even in cases where it is held to apply, — it appears to us that no new trial should be granted on account of Mr. *Procter* and Mr. *Edmund Tatham* not having been examined by the devisees on the trial of this issue.

We must consider, therefore, the second and principal ground upon which this application has been rested, viz. that the verdict of the jury establishing the competency of Mr. *Marsden* to make this will, ought not to be satisfactory to this Court; but that, upon the evidence disclosed at the trial, there is so much room to doubt the propriety of the verdict, that this Court ought to submit the question to the investigation of a second jury.

The grounds, upon which the validity of the will was contested at the trial, and which have been since relied upon in argument before this Court, seem principally two; first, the general incompetency of Mr. *Marsden* to make any testamentary disposition of his property, or, at all events, such a will as the present; and, secondly, that if Mr. *Marsden* was not altogether incapable to devise, yet he was of so weak and imbecile a mind as

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to make him easily subject to fraud and coercion, and that the present will was obtained from him under the effect of fraud or coercion exercised on him by Mr. *Wright*.

The first of these grounds, it will be readily conceived, is that upon which the decision of this cause must mainly hinge. For, on the one hand, if the jury ought to have found upon the evidence the general incapacity of Mr. *Marsden* to make a devise, there would have been no need for any further inquiry as to fraud or coercion; on the other hand, if the jury have properly found the general competency or capacity of Mr. *Marsden* to devise, such a finding would limit the investigation of the second question to a very narrow point, viz. to the single inquiry, what degree of fraud or what degree of coercion was exercised by the Plaintiff upon the mind of the testator? The question would in that case become this: assuming Mr. *Marsden* to have had generally sufficient understanding to enable him to dispose of his property by will, is there evidence of such fraud or such coercion by Mr. *Wright*, exercised upon the state of mind, such as it was, of Mr. *Marsden*, as to render the will in question, not the result of Mr. *Marsden's* free and uncontrolled agency, but in effect the will of Mr. *Wright*?

And upon this subordinate question, as to the fraud or coercion exercised upon Mr. *Marsden*, we think, if the general competency of Mr. *Marsden* to make a will has been properly established, there appears to be no sufficient evidence of actual fraud or coercion on the part of Mr. *Wright*, either in procuring this particular will and codicil to be made, or in the execution of the same, to call for a new trial, on this ground, as contradistinguished from the other.

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It was the general incapacity of Mr. *Marsden* to make a will which formed, as might be expected, the principal contention between the parties before the jury, and again upon the argument before this Court on the application for a new trial: and whether that question has been properly decided by the jury, is the point which is now to be considered.

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On the trial of this cause, for the purpose of proving affirmatively the general incapacity of Mr. *Marsden*, a very large body of parol evidence was produced by the Defendant in the issue, comprising not fewer than sixty-one witnesses in number; some of whom deposed to the state of Mr. *Marsden's* intellect and the powers of his mind in very early life, and others continued the account down to a period very shortly before his death in 1826. And if this evidence had been uncontradicted by testimony of a similar nature, and applying itself to the same points on the part of the Plaintiffs, the fair result of the Defendant's proof may be taken to have been this, — that Mr. *Marsden*, from his earliest to his latest years, was a very weak and imbecile man, of singular and capricious habits; that he was by nature extremely timid, and the prey of idle and unmanly fears; that he lived, in particular, in the habitual dread of Mr. *Wright*, who had obtained a complete dominion over him, and to whom he paid, on all occasions, the strictest and readiest obedience; that his understanding and judgment were far below those of the generality of men, indeed, not exceeding the level of children; and that according to the language of some of the Defendant's witnesses, "he was utterly incapable of managing and conducting his own affairs, and of giving instructions for such a will as that in question, even divested of its technicalities." Such evidence as this, had it not been met by proof of a contrary description, it is unnecessary to say, would

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have been decisive of the question of incapacity. But, on the part of the Plaintiffs, a body of witnesses were produced, large in point of number, though not so numerous as those on the part of the Defendant, and whose general testimony is of a nature not only conflicting, but utterly irreconcilable with the proof on the part of the Defendant. According to them, Mr. *Marsden*, the testator, was a man of very retentive memory, and although not of strong mind or of natural talent equal to the generality of men, yet of such understanding and judgment as to be competent to conduct all the ordinary transactions of life; and with reference to the immediate question under investigation, in the language of some of those witnesses, “a man perfectly competent to manage his affairs with the assistance of agents and professional men, and to make such a will and codicil as these in question.”

Where the question of competency is to be resolved on testimony so adverse and repugnant as the present, (and such repugnance does not consist so much in a contradictory account of single facts, as in the general narrative of transactions extending through the space of a long life), it is useless to argue on each particular fact brought forward on either side, or on the testimony given by each particular witness. The only inference that can be safely drawn, is that which arises from the general effect and tendency of the whole body of proof on each side of the question. The inquiry becomes this, Whether the general mass of evidence tending to establish the weakness and imbecility of the testator's mind, or that which tends to establish his competency, such evidence on each side extending through his long life, is entitled to the preference? And in solving such a question, it must be admitted that, even in this view of the case, it would be extremely difficult to draw a
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conclusion, from parol evidence so contradictory and conflicting as that in the present case, upon which reliance could be placed with perfect safety. If, however, it were absolutely necessary to decide this question on the judgment and opinion of the witnesses examined on each side as to the capacity of the testator, much would depend on the situation in life and the character of the respective witnesses, on the opportunities they respectively had to form any judgment upon the testator's understanding, and their ability to form a correct judgment; upon the degree of intimacy between the respective witnesses and the testator, the nature of their intercourse, and their habits of life together; upon the period during which their acquaintance continued, and, above all, the comparative closeness with which it is brought down to the time of making the will and codicil; in all which several particulars, if the evidence which has been given on each side should be weighed and balanced together, it is sufficient at present to observe, that there was a greater power and better opportunities of forming a correct judgment as to the testator's capacity on the part of the witnesses called by the Plaintiff, than of those called on the other side.

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But it appears to us to be unnecessary, on the present occasion, to have recourse to a mode of investigation so difficult. For where the question is left in doubt upon the parol testimony, and the facts of the case will warrant it, it is the safer course to try the question by the evidence of collateral facts which are not involved in the contradiction raised by the parol evidence. Such an appeal, at the same time, resolves directly the question at issue between the parties, and also determines incidentally to which class of witnesses, where they are repugnant and contradictory, the preference is to be given. Such was the rule applied by Lord *Redesdale* in

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the case of *Towart v. Sellers* (a), and it is obviously a rule founded on sound reason and common sense.

Now in the present case it appears to us there are three distinct classes of evidence which stand clear of the conflicting parol testimony relating to the competency of the testator, the consideration of which, if the facts are established by satisfactory proof, as they appear to us to be, lead directly to the conclusion that the verdict which has been found by the jury is the right verdict. Those heads of evidence are the correspondence between Mr. *Marsden* and his friends; the various acts done by him in relation to the disposition of his property; and the circumstances attending the preparation and execution of the will itself.

The correspondence of the testator, given in evidence at the trial, consists, first, of letters passing between him and Mr. *Greene*, who was acting as his solicitor, principally in conducting the purchase of a large property, and the raising money for that purpose, and extending from the year 1787, at different intervals, down to 1804; secondly, of letters passing between Mr. *Wright* and the testator, upon business and other subjects, in the interval between 1791 and 1814; thirdly, of letters between Mr. *Darson* and the testator, being principally letters on the ordinary topics occurring between friends from 1811 to 1819; fourthly, of letters between Mr. *Alexander Marsden* and the testator from 1811 to 1820, showing the commencement and progress of the acquaintance between those two gentlemen; and, lastly, of two single letters, one in 1797, from Mr. *Bickersteth*, the surgeon of Mr. *Marsden*, to that gentleman, containing a request to him to qualify as a commissioner

(a) 5 *Dow*, 251.

missioner under a road trust, and to give his vote for a Mr. *Dobson*, a request which was afterwards complied with; the other a letter in 1800 to Mr. *Baldwin* on the subject of the prosecution of some offenders against the game laws.

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The importance of this long and varied correspondence in deciding on the competency of the testator to make his will, is self-evident. If it be the genuine correspondence of Mr. *Marsden*, no one could hesitate to declare, that the man, who possessed sufficient vigour and energy of mind to carry on this correspondence, must be held to possess a disposing power over his own property. It was indeed so felt by the counsel for the Defendant, who admitted, what indeed could not be denied, that if these letters were the genuine letters of the testator, and the acts done by Mr. *Marsden* as to the disposal of his property were his own acts, there was an end of all question about the will. It is, however, suggested that the letters were written under the tutelage of Mr. *Wright* or some other person; that they were in reality *Wright's* letters, and not those of Mr. *Marsden*; and that the very circumstance of copies being found in *Marsden's* handwritings of all the letters, both trifling and important, which he wrote to his different correspondents, showed at once the authority of *Wright* over *Marsden*, and afforded proof of a deep-laid plan on his part to prepare evidence against the time it should be wanted in support of the validity of any act done by Mr. *Marsden* in the disposal of his property.

In order, therefore, to ascertain the weight due to these letters, the first question is, whether they are open to the objection above suggested.

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The single circumstance of copies having been made by Mr. *Marsden* of all the letters written by himself, and such copies having been carefully preserved by him, endorsed in his own handwriting, is surely too slender a ground for justifying the conclusion that the letters were written under the control of Mr. *Wright*. Admitting him to be a man of indolent habits, and averse to business in general, the preserving copies of the letters written by himself is quite as consistent with the supposition that a man with little general occupation, the master of his own time, should have made these copies for his own amusement, or for his future recollection, as with the inference that they were made by the contrivance of *Wright*.

The first observation, therefore, which arises upon these letters is, the absence of any direct proof that Mr. *Wright*, or any person on his behalf, was concerned in the fabrication of these letters. During so long and so varied a correspondence, if the fact had been so, it might surely have been expected that some evidence would have been furnished of interference on the part of Mr. *Wright*, either by direct testimony of the fact, or indirectly from the conversations of Mr. *Marsden*. But there is no evidence to this point of sufficient weight or preciseness to justify any inference of this nature.

In the next place it is to be observed, that, as to all the letters written to Mr. *Wright*, they must necessarily have been written in his absence, when the writer must have been free from his personal inspection and control. Some were written from *Buxton* to Mr. *Wright* when at *Wennington Hall*: some, from *Wennington Hall* to Mr. *Wright* when in *London*; others, during Mr. *Marsden*'s absence from home at *Belle Hill*. In
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none of these letters is there any proof of that degree of incapacity which is imputed to the testator. Mr. *Wright* could neither have dictated the answers nor compelled Mr. *Marsden* to keep copies of them. And there is no evidence in the case beyond mere surmise, that, in the absence of Mr. *Wright*, Mr. *Marsden* was acting under the control of any other person placed in his stead. With one of the letters Mr. *Wright* sends him some deeds of exchange, which he directs him to execute in the presence of Mr. *Carr* of *Settle*; and he answers in his letter that he has so executed them, as the fact appears to be. Fraud, control, or interference is not to be presumed, but, like any other fact, is to be proved by direct testimony; and there is none such as to these letters written to Mr. *Wright*.

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But, in the third place, there is not one of the correspondents of Mr. *Marsden* who was not personally well acquainted with him, either before the correspondence commenced or before it was brought to a close. Mr. *Greene* knew him well, both before and throughout the whole correspondence. Mr. *Dawson* knew him before the first letter was written, and visited him with his family, in the course of the correspondence. Mr. *Alexander Marsden*, after the correspondence had commenced, visits him, with his daughter, at *Hornby Castle*. Mr. *Bickersteth* and Mr. *Baldwin* knew him well before their letters were written. All these persons, therefore, were acquainted with the reach and capacity of his mind. But, with this knowledge of the person and character of Mr. *Marsden*, how can we suppose that the several correspondents could be themselves so far deceived, as to believe letters which were really written by Mr. *Wright* to have been the productions of Mr. *Marsden*? We think it therefore the safer inference to draw, that these letters, which were considered by his

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correspondents, who knew the extent of his capacity, to be his genuine letters, really were so, than, in the absence of any direct testimony, and under the difficulties which would surround such a supposition, to consider them to be letters either composed by *Wright*, or written under his immediate control.

The next class of collateral evidence is that which comprises acts done by Mr. *Marsden* relating to the disposal of his own property. Twenty-three deeds were proved to have been executed by Mr. *Marsden*, in the interval between 1782 and 1819, being various dispositions affecting his real estate. Of these, one was a mortgage to the large amount of 27,000*l.* The charges upon the property of Mr. *Marsden* were in many instances executed in favour of persons in the immediate neighbourhood, to whom Mr. *Marsden* was well known; amongst the rest, one was a mortgage in 1804 to Mr. *Edward Tatham*, one of the witnesses to his will and codicil. Two of the deeds, above referred to, were transfers of mortgages to the amount of 15,000*l.*, and were executed by Mr. *Marsden* subsequently to the date of the will. Thirty-five different deeds were produced, which had been executed by other parties to Mr. *Marsden*, between 1790 and 1824, and conveying property to him. Twenty-one bonds were given in evidence, all executed by Mr. *Marsden*, to various obligees, being securities to the amount of 16,000*l.* and upwards, between the years 1781 and 1814, all of which had been since paid off, and were then in the hands of his personal representative. Of these bonds, one in 1783 for 400*l.* was given to Mr. *Postlethwaite*, an attorney at *Lancaster*, who had been agent to Mr. *Marsden*; another for 6000*l.*, in 1806, to Mr. *Houseman*, a gentleman in his immediate neighbourhood, who had lived much with him, and on terms of great intimacy. One for 400*l.* in

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in 1814 was given to Mr. *Procter* the curate of *Hornby*, being one other of the witnesses to the will of the testator.

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These various acts involve dealings with the testator, by numerous persons, in which a mistake as to his capacity or competency would have been hazardous, and not improbably fatal, to the interests of the contracting parties. They are executed at intervals through a great extent of time, and relate to property of very large amount. The deeds of conveyance, both to and from Mr. *Marsden*, appear, almost without exception, to have been prepared by attornies, to whom Mr. *Marsden* was proved to have been well known, or who were attornies residing in his immediate neighbourhood. They were attested for the most part by attornies living in the neighbourhood of *Hornby Castle*; and so far as appears on the evidence, both the attornies who prepared the deeds, and the witnesses to them, were men of unimpeachable credit. If Mr. *Marsden* was really a person in the weak and imbecile state described by the witnesses on the part of the Defendant, or if he had been the mere tool or dupe of Mr. *Wright*, it is very difficult to conceive that such a state of incapacity should be unknown to them, when the mere execution of the deeds before them would of itself have given the opportunity of ascertaining his want of competency. And no reasonable supposition can be framed, that, with the knowledge of such his incapacity to transact business, they could have consented to attest the execution of deeds either to or by him, and thus make shipwreck of their own character and of the interest of their clients, without any visible equivalent. We cannot think the testimony of persons who have merely conversed with him, or met him at table, or on other occasions, and who pronounce him to be incapable, is for a moment to be put

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put in competition with the testimony of persons who have *dealt with* him, and by thus risking their own interests, furnish undeniable proof of their belief, and the sincerity of their belief, in his competency.

We come now to the third and last ground on which our opinion that there is no necessity for a new trial in this case has been formed, viz. the circumstances under which the will and codicil were prepared and executed. Mr. *Bleasdale*, the gentleman who was called in as the attorney to make the will, was a person who had retired from the profession of the law, in which he had practised long, and had acquired great experience. He was a person who had known Mr. *Marsden* when at school, and had kept up a constant acquaintance with him, which had increased with their age. He had lived since the year 1816 in Mr. *Marsden's* neighbourhood, and, for some years before his death, had been accustomed to visit him at *Hornby Castle* for ten days or a fortnight at a time. He had been first applied to after the death of Mr. *Marsden's* former attorney, Mr. *James Barrow*, to make his will anew, (a proof that Mr. *Marsden* had not been deemed incapable to make a will by a former attorney), and had made for him three several wills before that which is now in dispute; the testator always cancelling his former will, when he made a new one. To the two first wills Mr. *Bleasdale* himself, Mr. *Bickersteth*, the surgeon of Mr. *Marsden*, and the clergyman of *Hornby*, were the witnesses. To the third will the witnesses were the same as those who have subscribed the will and the codicil which are the subject of this suit.

Mr. *Bleasdale* received his instructions on all occasions from Mr. *Marsden* himself, and from no other person; at first receiving verbal instructions, and afterwards
written

written instructions for a codicil, in the handwriting of Mr. *Marsden*, and a note in his handwriting also, relating to the will itself, (which were given in evidence), in pursuance of which instructions Mr. *Bleasdale* prepared the will. He stated upon his examination, that, on each occasion when he prepared the will, Mr. *Marsden* explained his intentions and object in a way he could not mistake, and that he framed the will accordingly. He stated further, that he has no doubt Mr. *Marsden* was fully competent to understand the will and codicil now in dispute.

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Supposing, therefore, the testimony of Mr. *Bleasdale* to have been founded in truth, there is an end of the question. Mr. *Bleasdale* was a man of skill and experience; he had a thorough knowledge of the testator's capacity. There is no room, therefore, for mistake on his part. If the will prepared by him is not the will of Mr. *Marsden*, it must be the result of fraud and conspiracy between him and Mr. *Wright*. Mr. *Bleasdale* was open to cross-examination, and nothing was produced by it tending to impeach his testimony beyond this, that he was living on terms of intimacy and friendship with Mr. *Wright* and his family. But fraud and conspiracy, in this case, as in every other, must be proved: it is not enough to surmise or to suspect it; and looking at the testimony relating to the preparation of this will and codicil and the execution of them, we see no proof whatever of any indirect motive or any misconduct on the part of Mr. *Bleasdale*.

Without, therefore, entering upon an accurate calculation of the relative value of the parol evidence as to the question of the competency of the testator, and looking only to the effect of Mr. *Marsden*'s correspondence

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ence with his friends, to his dealings and transactions with other men in the disposition of his property, and to the circumstances attending the preparation and execution of the will and codicil, we see no reason for submitting this issue to a second trial. The cause was tried before a special jury, who appear to have shown great patience and attention in the discharge of their duty. The whole of the evidence was summed up to them by the learned Judge, and we think the question was properly left to them in the shape in which he proposed it, as a general question of the capacity of the testator to dispose of his property by will.

Upon the whole, for the reasons above given, we think the verdict which has been found by the jury ought to be satisfactory to this Court.

The LORD CHANCELLOR.

Their Lordships have been kind enough to assist me on this occasion, in consequence of my having not only acted as counsel for the Plaintiff on the trial of the issues, but having also argued the question at the Rolls on the application for a new trial.

Upon the first branch of the argument, my mind entirely goes along with the opinion delivered by my Lord Chief Justice, — that, as well on the authorities as on principle, that ground of appeal altogether fails. There is a broad line of distinction between cases where the moving party seeks to set the will aside, and cases where the moving party is a devisee seeking to establish it: the rule which makes it imperative to call all the witnesses to a will must be considered as applicable to the latter only.

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With respect to the merits, I did not think I could come to any conclusion with so much impartiality as, however it might satisfy myself, would be satisfactory to the parties; and by their consent, therefore, the consideration and decision of that part of the case, — of the question whether the verdict was right or wrong, and if wrong, whether it was so wrong as to require or justify a new trial, — has been left solely in their Lordships' hands. The judgment in point of form is mine, but in substance and effect, it is the judgment of their Lordships: and I neither agree nor differ with them, as I have carefully abstained from forming any opinion on the subject.

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This cause now came on for further directions, and a question was made as to the costs of the suit.

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For the Defendant it was argued, that the bill ought to be dismissed with costs. Not satisfied with alleging that the testator was not of sound and disposing mind, it brought forward a pretended case of gross fraud and undue influence, most injurious to the character of the Defendant *Wright*; every part of that case had failed: and it had been established by the verdict of a jury, approved of by the Judge before whom the issue was tried, and ratified by two judgments of this Court, that the will, which the Plaintiff sought to impeach, was the deliberate and valid act of a testator of sound and disposing mind. Under such circumstances the Plaintiff ought to pay the costs both of the suit and of the issue. This was the more reasonable, as there was nothing to have prevented him from bringing an ejectment, and consequently it was not necessary for him to come into equity, in order to be enabled to try his title. It was, indeed, admitted in the answers, that the legal estate in
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Where a bill is filed to set aside a will, and, upon an issue directed by the Court, the verdict of the jury is in favour of the will, and a new trial is refused, the bill will be dismissed without costs, unless the validity of the will could have been tried by ejectment.

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part of the property was outstanding in mortgagees: but there was no admission that the legal estate in the whole of the property was outstanding. In fact, the legal estate in many of the lands was in the testator at the time of his death: and the Plaintiff could have brought ejectment to recover possession of these.

On the other hand it was insisted, that the evidence in the cause and on the issue showed that the heir had not instituted the suit vexatiously, or introduced into his bill allegations which were not essential to the investigation of the case. How could it be suggested that he had proceeded without justifiable grounds, when even the costs of the appeal on the motion for a new trial were not given against him? It was impossible that he could have tried his title with any safety by an ejectment; for he might have been defeated in twenty successive ejectments by a defence setting up outstanding legal estates. It was admitted that the legal estate in the greater part of the property was in mortgagees: and if there were some lands, of which the testator had the legal fee in him at the time of his death, what means had the heir of distinguishing these lands from others, the legal fee of which was in third persons?

The MASTER of the ROLLS stated, that it not being clear, by reason of the alleged mortgages, that the Plaintiff, the heir, could have proceeded by ejectment, and the nature of the case making it reasonable that the heir at law should have full opportunity to investigate the circumstances under which the will was made, he could not consider the suit vexatious; and he therefore dismissed the bill without costs. But the Plaintiff was ordered to pay the costs of the issue. (a)

(a) *Scaife v. Scaife*, 4 Russ. 309.

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Nov. 8. 10. 15.

THE Defendant having, in breach of an injunction, removed part of the crops off the lands in his occupation, the Plaintiff obtained, and served him with, an order that he should stand committed for the contempt unless cause were shewn to the contrary on the first seal before *Michaelmas* term.

An order that a Defendant in contempt for breach of an injunction, shall stand committed, unless cause be shewn on a stated day, is not irregular if it be personally served.

The *Solicitor-General* (Sir *E. Sugden*) and Mr. *Wakefield* now moved that the order for the Defendant's commitment might be made absolute. It was the strictly regular course that the order should be taken *nisi* in the first instance. That course was followed in *Rudge v. Hughes* (a), where the defendant, after being personally served with the injunction, had proceeded to cut down fruit trees and commit wanton waste in a garden.

Mr. *Horne*, for the Defendant, submitted that the proceedings were irregular. According to the established practice the motion should have been made, upon notice, that the Defendant might at once be committed absolutely; and upon the discussion of that application all the circumstances would have been fully brought forward by affidavit. The rule was finally settled in *Angerstein v. Hunt* (b), and had never been departed from since. In the unreported case referred to, it appears from the registrar's book (c) that the defendant, who had been committed under an order *nisi* subse-

(a) 31st October 1818, Reg. Lib. B. fol. 1782.

(c) 25th January 1819, Reg. Lib. B. fol. 266.

(b) 6 Vcs. 488.

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subsequently made absolute, was shortly afterwards set at liberty on the application of the plaintiff himself, who submitted to pay the costs of the proceedings, a circumstance which afforded a fair presumption that those proceedings were considered quite irregular.

Nov. 13.

The LORD CHANCELLOR (Lord *Lyndhurst*).

The only question to be considered is, whether or not the order *nisi* is a regular course of proceeding when a party has been guilty of a breach of an injunction. It is laid down in the case of *Angerstein v. Hunt* that the order should be for the committal *instanter*, and that there should be no order *nisi* in the first instance. With respect to the authority of *Rudge v. Hughes*, referred to by Mr. *Wakefield*, although the facts of that case do not very distinctly appear from the statement in the registrar's book, Lord *Eldon* took time to consider the point. The party was committed under an order *nisi*, and after remaining three months in custody he was liberated at the instance of the plaintiff, who, believing the defendant to have been really innocent in intention, himself agreed to pay the costs. This, therefore, was a case of compassion, to which the plaintiff probably was the more inclined from the circumstance of the defendant being eighty years of age. Upon principle, I think that the order to shew cause does not in any way prejudice a defendant; for as he must be personally served, if he has merits, he may, on shewing cause, be dismissed. Such an order is not more hard than an order for an immediate committal. On the contrary, it is less so; for it gives the defendant longer time to consider and answer the affidavits made against him by the plaintiff. Upon principle, I think that an order to shew cause why a party should not be committed for breach of

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of an injunction may be served personally; and for this I consider the case of *Rudge v. Hughes* to be a conclusive authority. These proceedings, therefore, have been quite regular.

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ALEXANDER v. The Duke of WELLINGTON.

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L. C.
1831.
May 26, 27.

IN the year 1817, the late Marquis of *Hastings*, who was then Governor-General of *India*, and who also held the appointment of commander-in-chief of all the forces in the *East Indies*, as well those of his Majesty, as those of the *East India Company*, commenced hostilities against the *Pindarrees*, and against several of the *Mahratta* princes, who were threatening an attack on the *British* territories. With a view to the vigorous prosecution of the campaign, and in order more effectually to co-operate with the rest of the troops engaged in the same service, his Lordship took the field in person at the head of a large force belonging to the Presidency of *Bengal*, and known by the name of the Grand Army; but the chief burthen of active war fell upon the forces which were posted in the near vicinity of the hostile states. The forces assembled in that quarter consisted, partly of what formed properly the *Deccan* division, commanded by Lieutenant-General Sir *Thomas*

Military prize, when captured, is capable of being effectually assigned by the captor, before any interest in it has been vested in him by a grant from the crown.

A warrant of the crown, conveying military prize to trustees upon trust, to collect, recover, and receive the same, and directing the trustees, as

Hislop,

soon as the case would admit, to prepare a scheme for the distribution thereof, conformably to certain principles therein stated, and to submit such scheme to the Lords of the Treasury, for the signification of the royal pleasure thereon, is not an absolute or final grant: it creates no vested interest in any particular individuals, as objects of the bounty; nor can persons claiming to be *cestuis que trusts* compel a distribution under it by a suit in equity against the trustees.

Semle, The crown may at any time before distribution, alter or revoke a grant of military prize.

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Hislop, and partly of brigades and detachments from other divisions and belonging to different Presidencies. The whole bore the general appellation of the army of the *Deccan*, and acted under the orders of Sir *T. Hislop* in virtue of an appointment as its commander-in-chief. In the following year hostilities terminated in the total defeat and subjugation of the native powers, and a very large quantity of valuable booty, consisting chiefly of stores and treasure, fell into the hands of the conquerors as the fruits of their success. Portions of this booty were acquired by the enterprise of small detachments, who acting independently of the main army, attacked and plundered individual forts, in some instances after the camp had been broken up and open warfare had ceased. Another and much larger portion was captured by the troops composing the *Deccan* army, by whom the active operations of the war were principally carried on: but the whole of it, from whatever sources derived, and by whatever parties won, was ultimately thrown, under the general denomination of the *Deccan* prize, into one common fund, which, being prize taken in war, was admitted to have vested in the crown by force of the prerogative, and to be disposable therefore according to the pleasure of his Majesty.

On the 10th of *October* 1820, and the 1st of *December* 1822, long before any distribution of the booty had taken place, and before even the principles on which a distribution should be regulated had been declared, the Marquis of *Hastings*, who still continued to fill the offices of Governor-General and Commander-in-chief of the forces in *India*, executed and gave to Messrs. *Alexander* and Co. bankers in *Calcutta*, two several indentures, whereby in consideration of certain advances made to him, and to secure the repayment thereof, he assigned to *Alexander* and Co. all his expectant share
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and interest in the *Deccan* prize money whatever it might be.

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In the mean time it became understood that, in the exercise of the royal bounty, the *Deccan* prize would be distributed, as had been usual in similar cases, among the officers and men who had been concerned in its acquisition; and his Majesty having referred it to the Lords commissioners of the Treasury to consider and report upon the mode in which a distribution might be most equitably made, memorials were presented to their Lordships on behalf of the *East India* Company, Lord *Hastings*, Sir *T. Hislop*, and others, bringing forward the respective claims of the memorialists upon particular portions of the fund.

The result of their Lordships' deliberations was communicated to his Majesty in the form of a Treasury minute, which bore date the 5th of *February* 1823, and of which the following is the material part: —

“ My Lords, having heard counsel in support of the claims of the Marquis of *Hastings* and the grand army, and of those of Sir *Thomas Hislop* and the army of the *Deccan*, and having maturely and deliberately weighed and considered all the documentary evidence laid before them in behalf of the several parties, and the arguments of the counsel, are of opinion that the most just and equitable principle of distribution will be to adhere, as nearly as the circumstances of the case will admit, to that of actual capture, and although they are aware that the principle of constructive capture must, under certain circumstances in a degree be admitted, the disposition should be to limit rather than to extend that principle. They are therefore of opinion that the mode of distribution originally intended by the Marquis of *Hastings*

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would be most equitable and just with respect to the booty taken at *Poonah*, *Mahidpore*, and *Nagpore*, and that the booty taken on each of these occasions respectively should belong to the divisions of the *Deccan* army engaged in the respective operations in which the same was captured: but that as the division of the *Bengal* army under Brigadier-General *Hardyman* appears to have been put in motion for the purpose of co-operation directly in the reduction of *Nagpore*, and to have been actually engaged with a corps of the enemy antecedent to the surrender of that place, this division appears to my Lords to be justly entitled to share in the booty captured at *Nagpore*; and that such other booty arising from the operations against the *Mahrattas* in the years 1817 and 1818 as may now be subject to his Majesty's royal disposition, should be granted to such divisions of the grand army under the command of the Marquis of *Hastings*, and of the *Deccan* army under the command of Sir *Thomas Hislop*, as may respectively have captured the same. My Lords are also of opinion, that conformably to the letter of the Marquis of *Hastings* to Sir *Thomas Hislop* of the 12th of *January* 1818, Sir *Thomas Hislop*, as commander-in-chief of the *Deccan* army, and all the officers of the general staff of that army, are entitled to participate in the booty which may arise from any capture by any divisions of the army of the *Deccan*, until the said army of the *Deccan* was broken up on the 31st of *March* 1818. My Lords have felt it to be inconsistent with their duty, to recommend to his Majesty to give his sanction to any agreement for the common division of booty into which the several divisions of either army may have entered, as it is their decided opinion, that if the principle of actual capture be not adopted in this case, as the rule of distribution, no other correct or equitable rule could have been adopted than that of a general distribution among the forces of all the

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Presidencies engaged in the combined operations of the campaign. My Lords do not consider that, under all the circumstances of the case, it will be expedient to recommend to his Majesty to grant any part of the booty to the *East India* Company; and my Lords will submit to his Majesty their recommendation, that he will be graciously pleased to direct that his royal grant of the said booty may be made in conformity with these principles; and for the purpose of better carrying into effect his Majesty's gracious intention in this behalf, my Lords will recommend to his Majesty, that a grant be made of the said booty to trustees, to be appointed by his Majesty, for the purpose of ascertaining and collecting the said booty, and for preparing a scheme for the distribution thereof, conformably to the principles above stated, which my Lords will submit for his Majesty's final approbation and sanction under his royal sign manual warrant."

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This minute was on the 22d of *March* 1823 followed by a royal warrant under the sign manual, which, after reciting the circumstances under which the booty had been acquired and had become vested in the crown, set forth the treasury minute at large, and continued in these terms: — "And whereas we have been graciously pleased to approve of the said minute and recommendation of our said commissioners: and whereas it is expedient that a warrant under our royal sign manual should be issued for granting the said booty to trustees to be appointed by us, for the purpose of ascertaining, collecting, and receiving the same, and for preparing a scheme of the distribution thereof, conformably to the principles recommended in the said minute: We, taking the premises into our royal consideration, are graciously pleased to give and grant, and do by these

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presents give and grant," &c. The warrant then proceeded to grant to the Duke of *Wellington* and Mr. *Arbuthnot* all the property of which the booty was composed, "in trust for the purpose of collecting, recovering, and receiving all the said booty, or the proceeds or value thereof hereby granted, from the said United Company, their officers or servants, and all and every other person or persons whomsoever, unto or in whose hands, custody, or power the same, or any part thereof, may have come or may now be and remain;" and after investing the trustees with all the powers necessary for the due execution of their office, it continued in these words: — "And when and so soon as the case will admit, we do authorize and direct our said trustees to prepare a scheme for the distribution of the said booty, and of all and every part or parts thereof, conformably to the principles recommended in the said minute of the commissioners of our treasury, and approved by us, which scheme shall be submitted by them to the said commissioners of our treasury for the signification of our royal pleasure thereon."

When the trustees came afterwards to frame their scheme upon the basis of this warrant, difficulties were experienced in practically applying the principles laid down for their guidance to the actual state of circumstances before them, and considerable delay took place in consequence. Eventually they addressed a letter to the Lords of the Treasury, stating to their Lordships the various respects in which those principles were, in their opinion, incorrect and inapplicable; and a second minute, founded, in a great measure, on the views taken in the letter of the trustees, was shortly after drawn up and issued from the treasury. It bore date the 16th of *January* 1826, and was in these terms: —

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“ My Lords, assisted by the trustees of the *Deccan* booty, by Lord *Bexley*, and the law officers of the crown, having heard counsel on behalf of the Marquis of *Hastings* and the grand army, and also on behalf of Sir *Thomas Hislop* and the army of the *Deccan*, upon the subjects of discussion relating to the distribution of the *Deccan* booty, which have arisen out of the difference between the actual circumstances attending the capture of a large proportion of that booty, as stated by the trustees, and those which were assumed at the hearing before their Lordships in *January* 1823, and having maturely considered the arguments severally stated by the counsel, and also the whole of the documents upon the subject of this booty now before the board, are of opinion, —

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“ First, That with respect to all that portion of the booty now at the disposal of the crown which is described as having been ‘ taken in the daily operations of the troops,’ the distribution thereof should be made to the actual captors, according to the terms and conditions of the minute of this board of the 5th of *February* 1823, and of the warrant of His Majesty of the 22d of *March* following.

“ Secondly, That with respect to that part of the booty which consists of the produce of arrears of tribute, rent, or money due to the Peishwah, it appears to my Lords to have been acquired by the general result of the war, and not by the operations of any particular army or division, and they are of opinion that it ought, therefore, to be distributed in conformity with the alternative stated in their minute of the 5th of *February* 1823, as being ‘ the only correct or equitable rule, if the principle of actual capture cannot be adopted,’ viz., amongst the forces of all the Presidencies engaged in the combined operations of the campaign.

“ Thirdly,

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“ Thirdly, With respect to the property captured at *Nassuck*, my Lords are of opinion that the booty recovered at that place cannot be distributed upon the principle of actual capture, and ought, therefore, to be divided amongst the forces of all the presidencies engaged in the combined operations of the campaign.

“ Fourthly, With respect to the booty recovered at *Poonah*, alleged to have been removed thither from the *Rai Ghur*, my Lords are of opinion that this booty cannot be distributed upon the principle of actual capture to the force by which *Rai Ghur* was taken under the orders of the government of *Bombay*, unless it can be proved by the captors of *Rai Ghur* that the property in question was actually in that fort at the time when it was taken, in default of which proof my Lords are of opinion that this booty also ought to be distributed among the forces of all the presidencies engaged in the combined operations of the campaign.

“ Fifthly, With respect to that portion of the booty which is stated to consist of money recovered on account of deposits made by the Peishwah, my Lords are of opinion that any part of this property which can be proved to have been in *Poonah* at the time when that place was captured, viz. on the 17th of *November* 1817, ought to be distributed to the captors of *Poonah* according to the terms of the minute of the 5th of *February* 1823, upon the principle of actual capture; but that with respect to those parts of the above property as to which such proof cannot be established, such monies or effects must be considered as having been acquired by the general result of the war, and as such ought to be distributed amongst the forces of all the Presidencies engaged in the combined operations of the campaign.


“ Sixthly,

“Sixthly, With respect to the share of the commander-in-chief in the distribution under the several heads above enumerated, my Lords are of opinion that the Marquis of *Hastings* ought to share as commander-in-chief in all those cases in which Sir *Thomas Hislop* is not entitled to share as such under the terms of the minute of the 5th of *February* 1823, wherein it is declared, ‘That Sir *Thomas Hislop*, as commander-in-chief of the *Deccan* army, and all the officers of the general staff of that army, were entitled to participate in the booty which may arise from any capture by any of the divisions of the army of the *Deccan*, until the said army of the *Deccan* was broken up on the 31st of *March* 1818.’

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“My Lords are further of opinion that the general rules of division hitherto adopted in the distribution of booty to the forces in *India*, among the several classes and ranks of the army, should be adhered to on the present occasion.”

The minute of the 16th of *January* 1826 was followed by a warrant under the sign manual, bearing date the 30th of *September* 1826. This instrument stated, in its preamble, the warrant of *March* 1823, and the consequential grant to the trustees, reciting that such grant was made “in trust, for the purpose of being distributed to the said forces according to a scheme directed by our said warrant, and submitted by the said trustees to the commissioners of our treasury, for the signification of our royal pleasure thereon.” It then proceeded:—
“And whereas the said commissioners of our treasury have humbly submitted to us, for our gracious approval, a minute of their board, bearing date the 16th day of *January* 1826, containing directions to the said trustees as to the principles on which they were to prepare the
scheme

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scheme for the distribution of the said booty, of which further directions we have been graciously pleased to approve: and whereas the commissioners of our treasury have represented to us that they have maturely considered the schemes prepared in conformity to the said minute submitted to them by the said trustees for the distribution of certain parts of the said booty taken in the daily operations of the troops under the command of Lieutenant-General Sir *T. Hislop* at the following places; viz.,” &c. Here the warrant specified the several places where the booty taken was to be considered as falling within that description, and stated the value of the whole at 21 lacs 58,168 rupees, as more particularly set forth in the annexed schemes to which it referred. It then proceeded: “And whereas we are graciously pleased to approve of the said schemes, we do hereby authorise and direct our said trustees to distribute the proceeds of the said 21 lacs 58,168 rupees accordingly.”

The warrant for the distribution of those portions of the booty which were to be considered “as having been taken in the daily operations of the troops,” and therefore distributable upon the principle of actual capture, was followed, on the 13th of *February* 1828, by another warrant relating exclusively to that part of the booty to which the principle of constructive capture was to be applied. This latter warrant referred to, and formally approved of, the treasury minute of *January* 1826, in language precisely the same with that employed in the warrant of *September* 1826, already set forth; and it continued in these words:—“And whereas the commissioners of our treasury have represented to us that they have maturely considered the scheme prepared in conformity to the said minute, and submitted to them by the said trustees for distribution of a part of the

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the said booty acquired by the general result of the war by the forces under the command of the late most Noble the Marquis of *Hastings*, commander-in-chief of all our forces in *India*, amounting in all to 41 lacs 39,803 rupees, &c., as shewn by the said scheme hereunto annexed, &c.; and whereas we are graciously pleased to approve of the said scheme, we do authorise and direct the said trustees to distribute the proceeds of the said 41 lacs 39,803 rupees accordingly."

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The ostensible object of these two instruments was to give the royal sanction and approval to the schemes therein referred to, which were framed in conformity with the principles recommended in the treasury minute of *January* 1826. Their practical operation, when taken in connection with those schemes, was to authorise a distribution of the booty, proceeding to a much greater extent upon the principle of constructive capture than seemed to have been contemplated by the warrant of *March* 1823. The result was extremely prejudicial to the interests of Sir *T. Hislop* and the *Deccan* army, who, under the language of the original warrant, considering themselves the actual captors of the great bulk of the property, had expected to share it exclusively among themselves; and it was proportionably favorable to Lord *Hastings* and the Grand Army, who were thus let in to participate in a fund which the *Deccan* army had supposed to be peculiarly its own, and of which the share allotted to Sir *T. Hislop* became in consequence reduced from that of commander-in-chief to that of a subordinate officer only.

The Marquis of *Hastings* died in *November* 1826, before any distribution of the prize had taken place; and the bill was filed by Messrs. *Alexander* and Co. for the purpose of establishing their title under the indentures

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indentures of *October* 1820, and *December* 1822, to the share accruing to the Marquis's estate by virtue of the warrant of *February* 1828.

The scheme issued in pursuance of that warrant appeared in the *London Gazette* of the 11th of *March* 1828, and was entitled "Grant to the combined army which served under the command of the late Most Noble *Francis* Marquis of *Hastings*, K.G., commander-in-chief of all the forces in *India*, engaged in the war against the *Pindarrees* and certain of the *Mahratta* states, in the years 1817 and 1818." This scheme had ascertained the value of the share allotted to the commander-in-chief of what was there denominated "the combined army" at the sum of 44,201*l.*, being one-eighth of the whole fund thereby apportioned among the officers and men who composed that army; and as the description of commander-in-chief was understood to apply to Lord *Hastings*, although his name was not mentioned in the body of the scheme, the sum so allotted was paid into Court in the cause of *Watson v. Duke of Wellington (a)*, by the trustees of the *Deccan* booty, and on the dismissal of that suit, was directed to be retained to abide the result of the present claim.

Sir *T. Hislop*, who denied the validity of Lord *Hastings's* title, and various incumbrancers who set up claims against the fund under instruments posterior in date to the assignments to *Alexander* and Co., were joined with the Marquis's personal representative as Defendants to the bill.

Of the questions argued at the hearing, the most material were the two following: First, whether the share

(a) 1 *Russ. & M.* 602.

share of the Marquis of *Hastings* would pass by the assignment executed by him, after the booty had been taken, but before the crown had made any grant of it, or issued any warrant under the sign manual determining in what mode it should be distributed: Secondly, whether the amount of the share of the Marquis of *Hastings* was to be considered as definitively fixed by the warrant of 1828, or whether it was still open to any party to claim to have it reduced, according to the principle of distribution alleged to be established by the warrant of 1823.

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Mr. *Pemberton*, Mr. *Kindersley* and Mr. *Fane* for the Plaintiffs.

Captors have from the time of capture an inchoate right in effects captured as prize, which, though the title is not perfected till a grant is made by the crown, is a vested right and is capable of transmission by assignment or otherwise. In *Stevens v. Bagwell* (a) Sir *William Grant* says “though the property was not completely vested in the captors until condemnation, yet after condemnation it is by relation considered as theirs from the time of the capture. * * * * * The intention of the crown in all cases of this kind is to put what is, in strictness, matter of bounty upon the footing of matter of right. The service performed is thought worthy of reward; and, though the party performing it died before payment, the claim of bounty from the crown is considered as transmissible to his representatives, in the same plight and condition as the claim for wages, or any other stipulated or legal remuneration of service. In such cases the crown never means to exercise any kind of judgment or selection, with regard to the persons to be ultimately benefited by the gift. The repre-

(a) 15 Ves. 152.

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representatives, to whom the crown gives, are those who legally sustain that character: but the gift is made in augmentation of the estate, not by way of personal bounty to them. They take subject to the same trusts, upon which they would have taken wages or prize money, to which the party from whom they claim, might have been legally entitled." There is no authority or principle on which it could be held, that the interest which the captor has in prize money is not capable of assignment till the grant by the crown is completed.

The amount of the Marquis of *Hastings's* share is definitively fixed by the warrant and scheme of 1828, and no Court can now enter into the consideration of the question, whether a greater or less sum ought to have been allotted to him. As no proclamation has been issued regulating the distribution of such booty as might be taken in the war, the division could be only in such manner as his Majesty by his sign manual should direct.^(a)
 Sir

(a) The 54 G. 3. c. 86. s. 2. provides, "That in all captures which shall be made by his Majesty's army, royal artillery, provincial, black, and all other troops in the pay of his Majesty, or belonging to his Majesty, but in the pay of the united company of merchants trading to the *East Indies*, whether in conjunct expeditions with his Majesty's navy, or otherwise, of any fortress or possession of his Majesty's enemies upon the land, or of any ship or vessel in any road, haven, river, or creek belonging to such fortress or possession, the commanders and other officers and soldiers acting

on such expeditions shall have such right and interest as his Majesty shall think fit to order and direct, in all the arms, ammunition, stores of war, goods, merchandize, and treasure belonging to the state, or to any public trading company of such enemies, which shall be found in such fortress or possession; and also in all and every ship or vessel, with their arms, ammunition, tackle, apparel, and furniture, and all the goods, merchandize, and other effects on board the same, which shall be captured in any road, haven, river, or creek, belonging to such fortress or possession, after final adjudication.

Sir *Charles Wetherell* and Mr. *Stuart*, for Sir *Thomas Hislop*, contended, at great length, that the fund was bound by the warrant of 1823, which established the principle by which the distribution of the booty was to be made, and that the distribution directed by the warrant of 1828 was not in conformity to this principle.

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Mr. *Bickersteth* and Mr. *Griffith Richards*, for the personal representative of the Marquis of *Hastings*.


The Marquis of *Hastings* had not, at the time when the security to *Alexander* and Co. was executed, such an interest in the booty, as was capable of assignment. In *Stevens v. Bagwell*, prize money is placed on the same footing as wages. (a) It is settled that neither the full pay nor the half pay of an officer can be assigned or pledged; *Berwick v. Read* (b), *Flarty v. Odum*. (c) Considered as a remuneration for past services, prize money cannot be assigned; and if it is viewed as an excitement to future exertion, the same objection applies. The country has a right to require, that the officers and soldiers shall not place themselves in a situation, in which the motives, held out to them by the crown, shall be impaired in force. In the present case, there is a peculiar

(a) *Collyer v. Fallon*, T. & R. 459.

(b) 1 H. Black. 627.
(c) 3 T. R. 651.

adjudication thereof, as lawful prize to his Majesty, in any of his Majesty's Courts of Admiralty or Vice-Admiralty, which shall be duly authorized to take cognizance of the same (which courts are hereby required to proceed therein to lawful adjudication), to be divided in such proportions, and according to such general rule of distribution

for the army as shall be established by his Majesty, or in default thereof in such manner as his Majesty shall, under his sign manual, be pleased to direct." The 54 G. 3. c. 86. has since been repealed by the 2 W. 4. c. 53. which amends and consolidates the laws relating to the payment of army prize money.

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peculiar disability arising out of the situation of the Marquis of *Hastings* as Governor-general. The man who was Governor-general and commander-in-chief, was necessarily the person who would be principally consulted by the crown as to the mode of distribution which should be adopted; and in the present instance, communications on this subject did take place between the Marquis of *Hastings* and the officers of the crown. He would be exposed to temptation not to discharge his duty in such communications, if he were permitted previously to subject his own share in the booty to the demands of others.

Mr. *Wray* for the crown.

Mr. *Spence*, Mr. *J. Russell*, and Mr. *Wright* for other parties.

Mr. *Pemberton*, in reply.

Prize money is not in the nature of full pay or half pay. A soldier cannot assign his pay, because his pay is received for the purpose of enabling him to discharge the duties which he is hired to perform, and the probable result of alienating his pay would be to deprive him of the means of performing his duties. Prize money, on the contrary, is an extraordinary bounty granted by the crown as a reward for services already performed. The services having been performed, it matters not how the reward is dealt with by the party entitled to receive it; and whether it is assigned before or after the nominal grant by the crown must be altogether immaterial. Even considered as a stimulus to future exertion, it is not likely to act the less powerfully, because it has been appropriated to the payment of debts previously contracted.

If

If the distribution directed by the warrant of 1828 were at variance with the warrant of 1823, and the principle established by it, we might still argue, with much confidence, that the crown was at liberty, at any time before a scheme of distribution was finally settled, to alter the mode of distribution as to his Majesty might seem fit. In truth, however, the warrant of 1823 has not the effect which is attributed to it by Sir *Thomas Hislop*. It is merely a grant of the booty to trustees, upon trust to collect the property; with a direction that they shall prepare a scheme of distribution, conformable to a certain principle laid down in a treasury minute, and submit that scheme to his Majesty for approbation. The trustees frame their scheme upon the principle stated in the treasury minute; but, upon fuller examination with respect to some parts of the booty, the facts were discovered not to be such as they had been assumed to be, when the matter was before the Lords of the treasury. And, it was in consequence of this alteration in the state of circumstances, that the principle of actual capture ceased to be applicable to certain portions of the booty, to which it had been previously supposed to apply. The Lords of the treasury being informed of the facts as they really were, came to certain resolutions, which do not alter the principle established by the warrant of 1823, but are merely instructions to the trustees for the application of this principle. A scheme is accordingly prepared by the trustees, and approved by the crown; and a warrant for the distribution of the property, in conformity to that scheme, is issued under the sign manual.

The MASTER of the ROLLS held, that prize money was not in the nature of military pay, and was assignable in equity.

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He also held that the rights to the property comprised in the distribution made by the warrant of 1828, could be determined by that warrant alone, and that no claim to any part of that property could be sustained by Sir *Thomas Hislop* under the warrant of 1828.

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Sir *T. Hislop* appealed from the whole decree.

The LORD CHANCELLOR having called on the Appellant's counsel to begin,

Sir *C. Wetherell*, Mr. *Knight*, and Mr. *Stuart* contended that the warrant of *March* 1828 amounted to a final and indefeasible grant of the prize to trustees, for the benefit of a class therein distinctly indicated by description. Conformably to the principles laid down in the instrument for the guidance of the trustees, and from which they had no discretion or authority to deviate, and applying those principles strictly to the actual circumstances under which the booty in question was captured, the troops composing the army of the *Deccan*, under the command of Sir *T. Hislop*, were the persons exclusively answering the description. The individuals who were to take being thus ascertained, the trustees were merely empowered to act in a ministerial capacity, for the purpose of getting in the prize, and computing the value of each claimant's share according to his rank; and they were therefore to prepare a scheme, specifying in detail the exact amount of the several shares. The warrant was, therefore, in effect, a trust deed, vesting in Sir *T. Hislop* and the forces under his command, a definite and absolute interest in the fund; such an interest as entitled them to call upon the trustees to proceed in the execution of their trust, and to bring them judicially to account, if they afterwards attempted to re-
 mould

mould or evade it. It was no defence to the trustees to say, that the crown had issued two other warrants, of later date, in terms which virtually rescinded or revoked the first; for the property had been completely and irrevocably divested out of the crown by the original grant, and could not be resumed at pleasure by any subsequent act of his Majesty, and the warrants of 1826 and 1828, therefore, were altogether nullities.

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If the right were admitted to have been fully vested in Sir *T. Hislop*, the jurisdiction of the Court to adjudicate upon the warrant followed of course. There was no rule which laid it down, that when a royal grant once created a title, the validity of that title, and consequently the construction of the instrument creating it, might not, like any other matter, become the subject of litigation in *Westminster Hall*. Here, independently of the ground of trust before referred to, the fund which formed the subject matter of the grant having been brought into the Court of Chancery, the question of title to the fund, and, of necessity, the construction of the warrant, became collaterally, but regularly, cognizable in the same Court. *Stevens v. Bagwell. (a)*

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From the magnitude of the stake involved in it, this appeal is entitled to be termed very important; and it is also extremely important in another view, from the deep interest which many most meritorious individuals must necessarily take in the result. But here its whole interest ends; for if, on the one hand, I never saw a more important case, so, on the other, I have never, in the course of my experience at the bar, seen one less encumbered with any kind of difficulty.

I shall

(a) 15 *Ves.* 139.

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I shall begin with stating principles touching the uncontested rights of the crown in matter of prize; principles which have a material influence over the whole question, but which, however they may have been admitted in point of form, have been altogether lost sight of in their application to the argument. That prize is clearly and distinctly the property of the crown, that the sovereign in this country, the executive government in all countries, in whom is vested the power of levying the forces of the state, and of making war and peace, is alone possessed of all property in prize, is a principle not to be disputed. It is equally incontestable that the crown possesses this property *pleno jure*, absolutely and wholly without control; that it may deal with it entirely at its pleasure; may keep it for its own use, may abandon or restore it to the enemy, or, finally, may distribute it in whole or in part among the persons instrumental in its capture, making that distribution according to whatever scheme, and under whatever regulations and conditions it sees fit. It is equally clear, and it follows from the two former propositions, that the title of a party claiming prize, must needs in all cases be the act of the crown, by which the royal pleasure to grant the prize shall have been signified to the subject. Whether, where that act has once been completed, and it distinctly appears that the crown was minded to depart with the property finally and irrevocably — whether, even in that case, the same paramount and transcendant power of the crown might not enure to the effect of preserving to his Majesty the right of modifying or altogether revoking the grant, is a question which has never yet arisen, and which, when it does arise, will be found never to have been determined in the negative. But this at all events is clear; that when the crown by an act of grace and bounty, departs, for certain purposes and subject to certain

certain modifications, with the property in prize, it by that act plainly signifies its intention that the prize shall continue subject to the power of the crown, as it was before the act was done.

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This latter proposition is capable of illustration from a variety of sources, which were but slightly adverted to in the argument; for whether we refer to the decisions of venerable Judges, to the precedents furnished by prize proclamations, or to the more venerable authority of the letter of the statutes, from all of these it will be found that, in stating the absolute nature of the principle, I have not strained, but have rather fallen short of the truth.

The doctrine has been frequently recognized in cases where the question has arisen subsequently to the capture, and before condemnation: but the same principle was afterwards extended in the case of the *Elsebe Maas* (a) at the Cockpit, in which, after final adjudication in the Court below, but pending an appeal, and before the final decision of the appeal, the crown thought proper, for reasons of state and public policy, to restore the prize at the expense of the captors. In other words, it was there determined, and that too upon a solemn and most able argument, and by a Judge the most learned and eminent of his time, the present Lord Stowell, that when the crown saw fit to restore the capture, the captors, who had run the risk and suffered the loss, who had moreover borne the charge of bringing the prize into port, and the further costs of proceeding in the admiralty to adjudication, and had even undergone additional expenses in contesting their claim upon appeal, were altogether without

(a) 5 Rob. 173.

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without a remedy. "It is admitted," says Lord *Stowell*, in language which it would be vain to praise or attempt to imitate, "it is admitted on the part of the captors whose interests have been argued with great force, (and not the less effective, surely, for the extreme decorum with which that force has been tempered) that their claim rests wholly on the order of council, the proclamation, and the prize act. It is not, as it cannot be denied that, independent of these instruments, the whole subject matter is in the hands of the crown, as well in point of interest as in point of authority. Prize is altogether a creature of the crown. No man has, or can have any interest, but what he takes as the mere gift of the crown; beyond the extent of that gift he has nothing. This is the principle of law on the subject, and founded on the wisest reasons. The right of making war and peace is exclusively in the crown. The acquisitions of war belong to the crown, and the disposal of these acquisitions may be of the utmost importance for the purposes both of war and peace. This is no peculiar doctrine of our constitution: it is universally received as a necessary principle of public jurisprudence by all writers on the subject, '*Bello parta cedunt reipublicæ.*'" (a) Upon that principle, accordingly, and holding that right not to be divested by the proclamation, and order in council, and the prize act, Lord *Stowell* decided, that up to the period of final adjudication the crown can restore the prize, without thinking of consulting or taking the consent of the captor, who at his peril, and at the expense of his own blood and treasure, won that prize from the enemy.

It has been strongly argued that the difference between prize proclamations and the warrant in question is this, that the prize proclamations only intimate the intention to distribute

(a) 5 Rob. 181.

distribute or to grant, whereas here there is much more, —a grant actually executed. The prize proclamation, which was the subject of discussion in the case of the *Elsebe Maas*, now lies before me, and it will presently be seen whether or not that can, with any strictness of speech, be described as an intention indicated, and not a grant made. It is a solemn instrument—a proclamation by the King; and it runs in these terms;—"We, being desirous to make it known to our loving subjects, and all others whom it may concern, by this our proclamation, by and with the advice and consent of our privy council," —not that we intend to do this or that, but—"that our will and pleasure is, that the net proceeds of all prize taken, the right whereof is inherent in us and our crown, be granted to the takers, subject to the payment of costs and not otherwise, and the same prize may be so granted in the proportions and manner hereafter set forth, that is to say;"—and then comes the scheme of distribution, according to which the crown's will and pleasure is, that the prize shall vest and be distributed.

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Throughout the whole of the instrument I find not a letter or a syllable that looks like the reservation of a power to alter or revoke. Here is a gift by the crown, of a right inherent in the crown, to be distributed among the captors according to a scheme laid down "herein," and not elsewhere, to be distributed as "hereafter set forth" and not otherwise, and without a tittle that points to the reserving of a power to revoke, or alter, or modify that scheme. Now I have said that the higher authority of the act, if higher it be, shall affix the construction to this instrument, and shall shew what is the power of the crown, even after it has issued the prize proclamation, after it has finally approved the scheme of distribution, and finally stated in what way the distribution was to be effected. It might have been argued from

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from that proclamation, much more strongly than from the warrant under consideration, that the grant was irrevocably vested, and that the gift must be held as upon a conveyance in trust, subject to the direction of the Court and the pleasure of the *cestuis que trusts*. That proclamation looks forward to no other act upon which final distribution is to attach. It does not say in the language of the present warrant, "to be distributed in such way, or according to such scheme as our Lords Commissioners shall lay before us, and as we shall approve of." Observe, nevertheless, how the legislature has treated this very instrument in the prize act; and surely, if any statute be german to the matter in hand, it must be the one passed by the authority of the legislature at the beginning of each war, to regulate the rights of parties. No prize act ever presumes to interfere with the rights of the crown. No prize act ever assumes that the legislature is dealing with the rights of the crown, but suggesting and prefixing a statement, that the crown had given the net proceeds to be dealt with, in terms like the following, — "Whereas his Majesty hath, of his royal munificence, been graciously pleased by several proclamations, to declare his will and pleasure to give the benefit of all prize taken during the hostilities in which his Majesty is engaged, to the captors thereof being in his Majesty's service, or duly commissioned," — it then proceeds to declare, adopting and confirming the proclamation, "that the captures be decided and distributed in such manner as his Majesty hath been pleased to order by the said proclamation of the 7th of July 1803." But it does not stop there, as, had the grant been irrevocable and unchangeable, it would have done; — "or, in such manner as his Majesty, his heirs and successors may order and direct by any proclamation now or hereafter to be issued." Can any person who reads that statute doubt, that notwithstanding the words of gift used

used by the crown, notwithstanding the absolute and irrevocable nature of those words in the prize proclamation, the legislature did look forward to a future period, when the crown might thereafter recall and change the mode of distribution altogether?

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Here then is a legislative declaration, (for the statute is declaratory merely, and enacts no new law upon the subject,) that although the prize proclamation appears to make a distribution according to a scheme, without looking forward to any further approbation or alteration, the crown has still the power to alter that scheme and substitute another, to vary and revoke it, to make a new distribution upon principles wholly different.

Thus much with respect to prize at sea. In general, no act passes with respect to military prize; nevertheless, that rests upon the same principles of law. The 54 G. 3. c. 86. proceeds accordingly in these terms:—
“Whereas his Majesty hath, of his royal munificence, been graciously pleased by several proclamations, to declare his will and pleasure to give the benefit of all prizes taken during the hostilities in which his Majesty is engaged, to the captors thereof being in his Majesty’s service, or duly commissioned,” &c.; and the second section provides, that all captures shall be divided in such proportions, and according to such general rule of distribution for the army as shall be established by his Majesty, or in default thereof, in such manner as his Majesty shall under his sign manual be pleased to direct; notwithstanding the preamble had recited that his Majesty had issued his proclamation, stating the mode of distribution that was to be adopted.

I come now to the warrant which lies before me for construction in the present case. It is admitted upon all

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all hands, whether the Lords of the treasury were right or wrong in the conclusion they first came to, whether the second conclusion they came to is right or wrong, and whether the first was the same with the second, or the second altered or repealed the first, and substituted a new one, that these are no questions here. The only question raised now, and the only question which a court of law can entertain, is this, whether any thing was done by the crown in the first warrant, which though a less formal instrument than the proclamation of prize I have referred to, is in substance a proclamation, — whether this warrant, under the royal sign manual, affords any foundation for the contention so ably and explicitly maintained, that the crown departed with the property and vested a right in trustees for the benefit of parties in the nature of *cestuis que trusts*, a right which, though springing from a voluntary act of grace and bounty in the giver, became irrevocably vested in the trustees for those parties, and rendered the subsequent orders immaterial, inasmuch as they were superfluous and contradictory to each other.

First, I greatly doubt the propriety of calling this a trust deed, in any sense of the word. It is more like a power of attorney, given without an interest, and therefore revocable; or rather, perhaps, it resembles some of those arrangements, which are said to be of a family nature, for the payment of debts, and in which the principal object is not so much the creditor as the debtor, the maker of the instrument; and in this point of view the case becomes more nearly analogous to *Wallwyn v. Coutts*, (a) and *Garrard v. Lauderdale* (b) than to the cases of *Ellison v. Ellison*, (c) *Colman v.*

Sarrel

(a) 3 Mer. 707.

(b) 3 Sim. 1.

(c) 6 Ves. 656.

Sarvel (a) and *Pulvertoft v. Pulvertoft* (b); there being rather an agency created for the convenience of the grantor of the deed, than any interest conveyed to trustees for the benefit of those who may become beneficially entitled under it. But without pursuing this inquiry, let us look at the nature of the instrument itself. After reciting the minute of the treasury, and that "it is expedient that a warrant should be issued, to grant the said booty to trustees, to be named by us for the purpose of ascertaining, collecting, and receiving the same,"—not for distributing to *A. B.* and *C.*, the persons beneficially interested—no, but "for the purpose of preparing a scheme for the distribution thereof, conformably to the principles recommended in the said minute; We, taking the premises into our royal consideration, are graciously pleased to give and grant the same to our trustees, for the purpose of collecting, recovering, and receiving the booty." The warrant then proceeds:—"and also all monies into which the plunder or booty or any part thereof may have been converted, as well all such as may already have been secured or received into the hands of the United Company, or any of their officers or servants, or any other persons; as also all such as the trustees may hereafter recover or receive from the United Company, or any of their officers or servants, or any other person whomsoever;" and there it ends. The preamble says, "Whereas it is expedient to appoint trustees for the double purpose of collecting in the money, and for preparing a scheme for the distribution thereof;" the operative part says, "you the trustees are hereby vested with the booty, for the purpose of collecting and getting it in," without stating any other purpose. That is totally unlike vesting an interest in them for the purpose of distribution. What follows? Simply a direction

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(a) 1 Ves. jun. 50.

(b) 18 Ves. 34.

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a direction or power. The words are, "We do hereby empower the said trustees, under the authority, and by the direction of the commissioners of our treasury, to sue for and recover all such booty, and we authorize and empower our said trustees to allow all proper costs and charges, and we do authorize and direct our trustees to prepare a scheme for the distribution of the booty, and of all and every part and parts thereof, conformably to the principle recommended by the minute of the commissioners of the treasury, and approved by us, which scheme shall be submitted by them to the commissioners of our treasury" — to be acted upon by them without more ado? no such thing—"which scheme shall be submitted by them to the said commissioners of our treasury, for the signification of our royal pleasure thereon."

Suppose a man were to say, I make you trustees for distributing 1000*l.* among *A.*, *B.*, and *C.*; it might be contended that *A.*, *B.*, and *C.* were *cestuis-que trusts*, and that the trustees were answerable to them. But suppose he says, I make you trustees touching certain of my debts, and after you shall have called them in, you are to lay before me a scheme, which when I have approved of, you shall then distribute the funds to *A.*, *B.*, and *C.*, or somebody else. Can any one doubt that this would defeat the claim of *A.*, *B.*, and *C.*? Till I have seen the scheme, and exercised my discretion upon it, and issued what new directions I please, it cannot be said to vest a beneficial interest in the *cestuis que trusts*. All that this deed effects is, to appoint these persons "our trustees," (not trustees for the parties,) to collect the fund; and it desires them, in a manner merely directory, to lay a scheme for the distribution before the crown. Now, no such step was taken till the years 1825 and 1826, when a scheme was laid before the crown, and his Majesty thereupon issued a new warrant, referring

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referring to the former, and saying in effect, "I have had a scheme laid before me, and I approve of it." It seems to me therefore to be as plain as a matter of fact can be, that the crown in 1826 executed the intention which it professed in 1823, and that it then for the first time approved of a scheme of distribution. Then for the first time it made a final distribution, if up to this hour the distribution be final, a point as to which, upon the authority of the statute construing the prize proclamation, and treating it, though it makes no reference to the future, as if it were still subject to the power and revision of the crown, I am inclined to entertain doubt. It is said that the trustees were only called upon to make distribution according to the principles chalked out by the minute of the treasury, and that they were to act merely as calculators. But it seems a most extravagant supposition, and most derogatory to the dignity of the royal functions, that a mere arithmetical operation should be all that was committed to the trustees, and yet that the crown should reserve to itself the power of approving of this arithmetical operation. The trustees are to submit a scheme framed according to certain principles; but where would be the use of coming back with the result of an arithmetical computation which the Lords of the treasury were to lay before the crown? Was it necessary to put all this machinery in motion—to apply to the treasury, and from the treasury to the crown, in order that the latter might adopt a result founded on a simple principle of arithmetic? I cannot so read or understand the warrant without doing violence to all sound principles of construction.

Reference has been made to the case of *Stevens v. Bagwell* (a), where that which was a matter of bounty is put upon

(a) 15 Ves. 152.

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upon the footing of a right. . So far to be sure as the question regards the transmission of the right from the grantee, after it has once vested in him, he may sell or assign the bounty; he may transmit it to his heir, or sue for it, and say it has become a matter of right, and is no longer bounty. But is there a shadow of pretence for asserting that, as against the crown, or against trustees standing in the place of the crown, prize is a matter of right and not of bounty? Such a decision will be sought for in vain. . The only question, and I doubt whether in a matter so purely the creature of the crown it be a question, is, whether, inasmuch as the arrangement is revocable up to the last moment, the crown could constitutionally render it irrevocable. But here I can have no doubt; for the instrument, instead of making the grant irrevocable, takes express pains to shew it to be revocable; — if indeed the property be granted at all; which it is not, for the warrant is only an instruction to lay a scheme before the crown, and after that has been approved, to proceed to invest and distribute.

Upon these grounds, I entertain no doubt whatever that this question, upon the merits, is wholly beyond the jurisdiction of the Court. Whether the lords of the treasury came to a rightful decision in 1823, or to a more rightful decision in 1826, — whether the crown has erroneously or properly, correctly or incorrectly, justly or unjustly, (using the word in a vague sense, for justice is a term improperly applied to an act of mere grace,) come to a decision upon the advice tendered by the Lords of the treasury, is no question for this place. It is enough for this Court, and for the Court below, that the crown has given the booty by the instruments before me, and that, notwithstanding any thing that had been, or had begun to be, granted three years before, the crown had a right so to give it.

It

1831.

ALEXANDER

v.

The Duke of
WELLINGTON.

It is said that there is great confusion here; that the decision giving the property to Lord *Hastings*, as commander-in-chief, professes to proceed upon one principle, and that the former decision, giving it to Sir *Thomas Hislop*, under the name of commander-in-chief, proceeds upon another principle. But all such considerations are met by observing, that they are useless and foreign to the question in hand, unless they raise some doubt upon the construction of the instrument. Those who so argue do not pretend to say that this instrument is not plain. It is too plain and too strong for them. Their argument is, that the prize was once given to Sir *Thomas Hislop*, and now to Lord *Hastings*, — once to Sir *T. Hislop* by one royal warrant, and now to Lord *Hastings* by another, which latter, they contend, affects most inconsistently to proceed upon a recognition of the former. But suppose the first instrument had said, “the actual captors shall have the booty,” and the second instrument had said, “whereas it is right to adhere to the first instrument, and that the actual captors should have the booty, and whereas Sir *T. Hislop* is the actual captor, nevertheless we please to give it, not to the actual captor, but to Lord *Hastings*, the constructive captor;” — that would be much stronger than the present case: nevertheless, if it be clear in the operative part of the grant, whatever the reasons in the recital may be, that the crown meant to dispose of the property by the last grant, the crown had the power so to do, notwithstanding this inchoate proceeding, be it inconsistent, be it self-contradictory, or repugnant to the other. If, therefore, it be clear that the crown so intended, the crown had the right; and the crown having the right, and having exercised it, the appellant can have no title to raise the question here, whether the crown acted well, or was well and wisely advised in bestowing the bounty upon others.

1830.

ROLLS.

Nov. 15. 22.

ADAMSON v. EVITT.


Where the grantee of an annuity is induced by false representations or improper concealment of facts on the part of the grantor or his agent, to become the purchaser of an annuity, although he may have relief at law, a court of equity has concurrent jurisdiction.

The grantor and his agent in such transactions are not bound to disclose all the circumstances of the grantor's situation; they are, however, bound to give honest answers to questions put to them.

THE Plaintiff was an auctioneer, who for the price of 700*l.* had purchased from *Lea* an annuity of 85*l.* a year for three lives, on the personal security of *Lea* and two sureties; the Defendants were the solicitors who had conducted the negotiation, and completed the transaction. The annuity was paid during three years; but no more payments were made on account of it; and the grantor and his sureties were insolvent, so that it was now of no value. The bill charged that the Defendants had concealed from the Plaintiff facts which it was their duty to have disclosed to him, and had misrepresented to him the circumstances of *Lea* and the sureties; and it prayed that it might be declared that they had by these means fraudulently induced him to become the purchaser of the annuity, and that they might be made answerable for the loss which he had thereby sustained.

Lea was a clerk in the service of the *East India* Company, at a fixed salary of 800*l.* a year, and he received an additional 100*l.* a year as clerk to one of the committees. In 1819, being indebted to nearly the amount of 1300*l.*, he applied to the Defendants to undertake the arrangement of his affairs. To provide a fund for the payment of his debts he assigned to three trustees, of whom *Evitt* was one, 400*l.* a year out of his salary, and the lease of his house, and executed a warrant of attorney to enter up judgment against him for 2000*l.* Shortly afterwards it was determined to raise a sum of 700*l.* by way of annuity, and *Evitt* proposed the security to *Adamson*, for whom, though he was not his regular solicitor, he had in the course of twenty years been concerned

cerned in money transactions three or four times. The annuity was to be at the rate of twelve per cent., and the security was to be the personal security of *Lea* and two sureties. At one time *Evitt* had agreed to be one of the sureties, if two others could not be found; but other sureties were found, one of whom was a purser in the service of the *East India* Company, with an income of between 300*l.* and 400*l.* a year, and the other was a clerk in the war office, at a yearly salary of 300*l.* The Defendants, with the consent of the Plaintiff, prepared the securities; he paid to them the 700*l.*; and they placed it to the credit of *Lea's* account, on which there was at that time, and previous to the receipt of this sum, a balance of 150*l.* in *Lea's* favour. On the other hand, they, as endorsers of a bill for his accommodation, were under a liability for him to an amount of about 200*l.* In the three following years the account was turned against *Lea*; and a balance of several hundred pounds became due from him to the Defendants.

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Mr. Bickersteth and *Mr. Roupell*, for the Plaintiff.

It is clear that, at the time of the purchase of the annuity, *Lea* was entirely insolvent, and that the Plaintiff never would have advanced his money on the personal security of an individual in such circumstances. The situation of *Lea* was well known to *Evitt*, and it was his duty to have communicated to the Plaintiff every thing which it was fit the Plaintiff should know, with a view to his guidance in the transaction. No professional man, except *Evitt* and his partner, was concerned in the matter. They must therefore have acted as the solicitors and agents of both parties: and, as the solicitors of the Plaintiff, they prepared the deeds, and entered up the judgment. The liability under which they at that time were for *Lea*, gave them a direct interest in inducing *Adamson* to advance his money. If the latter

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had been aware of that circumstance, it would probably have deterred him from trusting *Lea*, and he would, at least, not have placed unlimited confidence in the Defendants as his agents, had he been aware that they had an interest adverse to his own.

Evitt must have represented to *Adamson* that *Lea* was a solvent man, and that his personal obligation was a good security. The offer to be himself one of the sureties for the payment of the annuity is in itself a representation that *Lea* might safely be trusted, and shews that, in the negotiation, the Defendants must have held out *Lea* as a man of solvent circumstances. It is admitted that they stated he had a salary of about 1000*l.* a year: in fact, his salary was only 900*l.* a year, of which 400*l.* had been assigned, so that his disposable income could not be more than 500*l.* a year.

Thus, by the fraudulent concealment of facts, which ought to have been communicated to the Plaintiff, and by fraudulent misrepresentations of the pecuniary circumstances of *Lea*, the Defendants induced the Plaintiff to become the purchaser of an annuity, which now turns out to be of no value, and to pay to them, as consideration for it, a sum of 700*l.* They are bound in a court of equity to make good the loss which their fraud has occasioned.

Mr. Pemberton and Mr. Wakefield, contra.

The Plaintiff, who has long been engaged in an extensive business, trusted his own judgment in this matter: he did not require the assistance of an attorney, to advise him as to the prudence or imprudence of lending money on the proposed security: and the single circumstance of his allowing the deeds to be prepared by *Evitt* and his partner, will not make them his agents
in

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in negotiating and concluding the terms of the contract. He was to get an annuity during three lives, and the life of the survivor, at the rate of twelve per cent, and he was to have the security of three persons: and, for so extravagant a rate of profit, he was willing to run some hazard. Concealment and misrepresentation are positively denied; and there is no evidence to contradict the answer. The representation that *Lea* had a salary of about 1000*l.* a year, was sufficiently accurate; and of what importance is it, that he, at that time, owed debts to the amount of about 1300*l.*? The Plaintiff never could have supposed that he was dealing with a person in unembarrassed circumstances: for what man, except under the pressure of extreme pecuniary difficulties, would have consented to grant an annuity of 85*l.* a year for so small a sum as 700*l.*?

But even if the Defendants have been guilty of concealment or misrepresentation, what right has the Plaintiff to come into a court of equity? His case, according to his own statement, is, that the Defendants, acting as his solicitors, have fraudulently procured him to advance money on a bad security; why then does he not bring an action at law against them? The alleged wrong of which he complains, is a legal wrong; and a judgment at law, if he be right on the merits, would give him the relief he asks.

Mr. Bickersteth, in reply.

The wrong of which we complain, is a loss occasioned by fraud; and that fraud was the fraud of our agent. In respect, therefore, both of the fraud, and the confidential relation subsisting between those who practised the fraud and him who suffered by it, a court of equity has jurisdiction.

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EVITT.

Nov. 22.


The MASTER of the ROLLS.

The Plaintiff was the purchaser of an annuity of 85*l.* for three lives, for the sum of 700*l.* The Defendants are solicitors, who, on the part of the grantor of the annuity, proposed the purchase to the Plaintiff: and the Defendant *Evitt* had at one time proposed to become a surety for the payment of the annuity, if two other sureties could not be found; but two other sureties were found. The deeds were prepared by the Defendants, with the consent of the Plaintiff: and the annuity was regularly paid for three years by *Evitt*, who had a running account with *Lea* the grantor, and charged him in that account with the amount of those payments.

The bill charges that the Plaintiff was induced to become the purchaser of the annuity by the misrepresentations of the Defendants as to the circumstances of the grantor and his sureties, and by their concealment of a part of the facts relative to the actual circumstances of the grantor and his sureties, which were well known to them: and the Defendants, it is alleged, had an interest in the raising of the money; inasmuch as the grantor was indebted to them at the time, and they were under liabilities on his account, and the purchase money was to be applied to their payment and indemnity.

If, by the misrepresentation, on the part of the Defendants, of facts relating to the circumstances of the grantor or his sureties, or by the concealment, on the part of the Defendants, of facts relating to those circumstances, which the Defendants were bound to disclose, the Plaintiff was induced to become the purchaser of this annuity, and has in consequence suffered a loss, there can, I think, be no doubt that the Plaintiff could sustain an action at law for damages against the Defendants, in the nature of an

an action of deceit. But this Court, nevertheless, with respect to the fraud, would have a concurrent jurisdiction with a court of law. These principles were fully discussed in the case of *Evans v. Bicknell* (a).

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The only representation, admitted by the Defendant to have been made to the Plaintiff, was, that the grantor was an officer of the *East India* Company, with a salary of about 1000*l.* a year: and, in truth, he was such an officer, with a salary of about 900*l.* All other misrepresentations (if this can be deemed a misrepresentation) are expressly denied.

It is proved that the Defendant *Evitt* did at first offer to become surety for this grantor, though he did not ultimately enter into that engagement; and it is argued that this offer to become a surety is evidence that he represented the grantor as a person in competent circumstances. I cannot charge the Defendants by such an inference. The request of the Plaintiff that the Defendant should be a surety, rather affords evidence that the Plaintiff had not full confidence in the solvency of the grantor. There is no evidence or admission of any material representation on the part of the Defendants, with respect to the sureties.

It appears that the grantor, being indebted to the extent of 1300*l.*, had, shortly previous to the grant, executed a deed, whereby he assigned 400*l.* a year, part of his salary, and the lease of the house in which he lived, to trustees for the benefit of his creditors; that he had confessed a judgment for 2000*l.* for the same purpose; and that the Defendants in these transactions were concerned for him as his attorneys. It is said, that they ought

(a) 6 *Ves.* 173.

1830.

ADAMSON
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ought to have disclosed these circumstances to the Plaintiff; being to be considered as his attorneys also, because, with his consent, they prepared the annuity deed. The mere preparation of the deed could not place the Defendants in a confidential relation towards the Plaintiff in this transaction.

'The grantor of an annuity is not bound to lay open to the intended grantee all the circumstances of his situation. He is bound only to give honest answers to questions put to him by the intended grantee. The agents of the grantor stand in his situation, and are not bound to do more.

There was at the time of this grant a running account between the grantor and the Defendants, upon which the Defendants were then indebted to the grantor in the sum of 150*l.*; but they were under liabilities for him to the amount of 200*l.*: so that, upon the whole, they might be protected to the amount of 50*l.* by this purchase of the annuity. The Defendants were clearly not bound to disclose these circumstances to the Plaintiff. But the head of concealment in this case is altogether out of the question. So far from any concealment being admitted, the answer of the Defendant *Evitt*, with whom principally *Adamson* professes to have dealt, expressly states, that all these circumstances were disclosed to the Plaintiff before his purchase, and that the Plaintiff relied upon the inquiries which he himself made with respect to the grantor and the sureties.

The grant of the annuity of 85*l.* is for three lives; and the price paid is a sum of 700*l.* The Plaintiff is an auctioneer, and accustomed, no doubt, to transactions of this nature. He could not but know that the grantor was in embarrassed circumstances; for no person not
em-

embarrassed would submit to such terms. The very terms of the purchase imported hazard in the transaction.

The Plaintiff has made out no case, which can in reason throw the loss upon the Defendants: and the bill must be dismissed with costs.

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ADAMSON
v.
EVITT.

BROOK v. SMITH.

ROLLS.
Nov. 26.

THIS was a creditor's suit; and a decree had been obtained for the sale of the estate of the debtor. He had devised his lands to two persons as tenants in common in fee: one of them had died intestate, leaving an infant heir. The present petition was presented in the cause and under the 1 W. 4. c. 47. s. 11.* praying that the infant

The testator devised his estate to two tenants in common in fee; one died after the testator, leaving an infant heir. In a creditor's suit, after a decree for sale of the estate, the infant heir was ordered to join in the conveyance to the purchaser, under the 1 W. 4. c. 47. s. 11.

* " And be it further enacted, that, where any suit hath been or shall be instituted in any court of equity, for the payment of any debts of any person or persons deceased, to which their *heir or heirs, devisee or devisees*, may be subject or liable, and such court of equity shall decree the estates liable to such debts, or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any *such heir or heirs, devisee or devisees*, an immediate conveyance thereof cannot, as the law at present stands, be compelled, in every such case

such court shall direct, and, if necessary, compel such infant or infants to convey such estates so to be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, and in such manner as the said court shall think proper and direct; and every such infant shall make such conveyance accordingly; and every such conveyance shall be as valid and effectual to all intents and purposes as if such person or persons, being an infant or infants, was or were at the time of executing the same of the full age of twenty-one years."

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infant heir of the devisee might be directed to join in the conveyance to the purchaser.

A doubt was suggested by Mr. *Piggott*, whether the eleventh section of the act applied to a case like this, where the infant was neither the heir nor the devisee of the debtor, but was the heir of the devisee.

The MASTER of the ROLLS, considering the case to be within the statute, made the order.

ROLLS.
Dec. 21.

CHAPMAN v. TENNANT.

The eleventh section of the 1 W. 4. c. 47. extended to a case where the decree in the cause was made prior to the act.

THIS was a creditor's suit; and a decree had been made in it prior to the 1 W. 4. c. 47., for the sale of an estate for the payment of debts: but the estate was not actually sold until after the passing of that act.

The petition of the Plaintiff now prayed, that the heir and devisee, who were both infants, might be directed, under the eleventh section of that act, to convey to the purchaser.

It was observed, that though the words at the beginning of the clause — “where any suit hath been or shall be instituted” — clearly include suits previously instituted, as well as suits which should be instituted afterwards; yet, in the next member of the sentence, terms of narrower import are used; and the case in which the clause is to apply, is stated to be, where — “such court of equity *shall* decree” — not — “shall have decreed or shall decree” — the estates to be sold. On this ground a doubt

was

was suggested, whether the act applied where the decree was pronounced prior to the passing of the act.

1880.

CHAPMAN

v.

TENNANT.

The MASTER of the ROLLS observed, that, although the authority was plainly given in suits which had been commenced prior to the act, yet the subsequent language seemed to point to sales under decrees made subsequent to this act: but considering the case to be within the spirit and intention of the act, he made the order as prayed.

SHEWEN v. VANDERHORST.

ROLLS.

Dec. 4.

UPON an account of debts before the Master, in a suit for the administration of assets, the Plaintiff had objected to the demand of a creditor, upon the ground that it was barred by the statute of limitations, and the Master allowed the objection, though the executor did not set it up, and was willing to waive it.

After a decree in a suit for the administration of assets, an executor is not at liberty to do any act which affects the relative rights of creditors.

The creditor excepted to the Master's report; insisting that the executor of the debtor was at liberty, if he thought fit, not to set up the statute of limitations as a bar to any debt, and that, as he had not insisted upon it, the Plaintiff could not raise the objection.

The MASTER of the ROLLS over-ruled the exception. He stated the ground of his decision to be, that, after a decree, the executor was not at liberty to do any act which affected the relative rights of creditors.

His

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SHEWEN

v.
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HORST.

His Honor's decision was, on appeal, confirmed by the Lord Chancellor. (a)

(a) The argument and judgment on the appeal have been already reported in 1 *Russ. & Mylne*, 547. but, from an accidental circumstance, the ground of the decision of the Master of the Rolls is not there stated.

ROLLS.
Dec. 7.

DAVIS v. BATTINE.

A mortgagee, who has taken the body of his debtor in execution for the mortgage debt, is, nevertheless, entitled to the benefit of his mortgage security.

A CREDITOR, who had a mortgage security for his debt, had sued the debtor, and taken him in execution. The debtor afterwards took the benefit of the insolvent act.

On an exception to the Master's report, the question was raised, whether the debt was not satisfied by the body of the debtor having been taken in execution, so as to extinguish the lien of the creditor on the land.

Mr. *Treslove* and Mr. *Martin*, in support of the exception.

In *Burnaby's* case (a), it was held that a creditor, who had taken the body of his debtor in execution, could not be a petitioning creditor to sustain a commission of bankrupt; because the body of the debtor being in execution was, in point of law, a satisfaction of the debt. If the debt be absolutely satisfied, how can the creditor claim further satisfaction? No instance can be adduced in which a mortgagee, having taken the body of the mortgagor in execution for the mortgage debt, has gone on to foreclose. The principle of the Court is, that

(a) 1 *Strange*, 653.

that a mortgagee, though he may have recourse to all his remedies, cannot have a double satisfaction. If he forecloses and sells the estate, he will not be permitted afterwards to sue on the covenant for the deficiency.

Perry v. Barker (a), Tooke v. Hartley. (b)

1830.

 DAVIS
 v.
 BATTINE.

Mr. Wilbraham, contra.

The MASTER of the ROLLS said, he did not remember to have heard it ever suggested that a mortgagee, by proceeding to execution against the body of the debtor, released his interest in the land; and he over-ruled the exception.

(a) 13 *Ves.* 198.

(b) 2 *Bro. C. C.* 125. and see *Greenwood v. Taylor*, 1 *R. & My.* 185.

1830.

ROLLS.

Dec. 3. 6.

WALSH v. WALLINGER.

Where there is no appointment under a power, and no gift over in default of appointment, those persons only will take who could take by appointment.

A testator gave the residue of his personal estate to his wife, for her own sole use and disposal, trusting that she would thereout provide for his family, and particularly his only son; and, at her decease, give and bequeath the same to her children by him, as she should appoint:

Held, that the wife could appoint only by will, and that children living at her death were alone entitled to share in an unappointed portion of the fund.

THE testator, *John W. Arnold Wallinger*, by his will, dated the 19th of *January* 1805, gave his personal estate to his wife, *Matilda*, for her own use and benefit, and devised all his real estates to trustees upon trust to sell the same, and, after deducting the expenses of the sale, and paying the incumbrances thereon, and all his just debts, to pay the residue “unto his said wife, to and for her own use and benefit, and disposal, trusting that she would thereout provide for and maintain his family, and particularly his only son; and, at her decease, give and bequeath the same to her children by him in such manner as she should appoint.”

The testator died on the 23d of *January* 1805, leaving his widow, a son, and eight daughters him surviving.

By an indenture bearing date the 14th of *February* 1817, to which *John A. Wallinger* the son was a party, the mother, in order to place him advantageously in partnership, appointed to him the sum of 1000*l.*, part of the residuary fund: and it was thereby declared and agreed between her and him, “that he the said *John A. Wallinger* should not be entitled to any further or other portion or share of and in the residue of the monies arising from the sale of the real estate of *John W. Arnold Wallinger* deceased, unless the said *Matilda Wallinger* should, by any deed or deeds in writing, under her hand and seal, or by her last will and testament, make any further appointment or disposition in favour of him the said *John A. Wallinger* from or out of the same.” This sum of 1000*l.* was raised and paid to the son.

Caroline,

Caroline, one of the daughters, died in 1828, without having had any part of the fund appointed to her.

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 WALSH
 v.
 WALLINGER.

The widow by her will, executed in *May* 1828, reciting that two of the daughters were amply provided for, and that her son had already received 1000*l.*, which was as much as could be spared from the daughters, directed that these two daughters and the son should not have any share in her property, and appointed the residue of the trust monies to her other five surviving daughters in equal shares.

The bill was filed by the five appointees and their husbands, and prayed that the will might be declared a valid execution of the power.

One question in the cause was, whether the widow could appoint to some of the children, totally excluding others.

Mr. Pemberton and *Mr. Longley*, for the Plaintiffs.

Mr. Tinney and *Mr. Temple*, for other parties in the same interest.

It was the intention of the testator to give his wife a very large discretionary power over his property; the only limit to her discretion was, that no part of the residue was to be given to any person who was not a child of his; but so long as the whole of it was enjoyed by a child or children, she might give it to any one or more of them, according as she might think fit. She was to have an absolute power of selection. In *Civil v. Rich* (a), the power was to give "to children and grandchildren, according to their demerits:" and a gift of the whole to one was sustained. In *Burrell v. Burrell* (b), a
 testator

(a) 1 *Ch. Ca.* 309. and 2 *Chen. Rep.* 141.

(b) *Amb.* 660.

1830.

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v.
WALLINGER.

testator gave all his real and personal estate to his wife, "to the end she might give his children such fortunes as she should think proper, or they best deserve:" and an appointment, which gave a son only one guinea, and was so far clearly illusory, unless the donee of the power was authorized to exclude him *in toto*, was held to be good. *Gibson v. Kinnen* (a), *Spencer v. Spencer* (b), *Kemp v. Kemp*. (c)

Mr. *Bickersteth* and Mr. *Cooke*, *contra*.

The property is to go to the children in such manner, that is to say, in such manner and proportions as the widow should appoint. All are to participate substantially: and her authority is merely to vary the respective shares. *Kemp v. Kemp*, *Vanderzee v. Aclo*m (d), *Mason v. Limbery* (e).

The MASTER of the ROLLS.

The question is, whether the words "in such manner as she shall appoint," import that the widow was to have the power to exclude any of the children, or merely that she was to give the property to them in such shares as she might think fit, and as might best suit their respective circumstances. If the direction had been, that at her death the property should go to the children as she should appoint, all the children, according to decided cases, must have taken. There is no sensible or substantial distinction between such a direction and the expressions which are used here. Therefore, all the children are entitled, who were capable of taking under an appointment by the mother.

Another

(a) 1 *Vern.* 66.


(b) 5 *Ves.* 362.

(c) 5 *Ves.* 861

(d) 4 *Ves.* 771.

(e) Cited in *Sugden on Powers*,
401. 4th edit.

Another question was, whether the personal representatives of *Caroline*, who died in the lifetime of the widow, were entitled to share in a part of the property which was unappointed by the will of the mother.

1830.

 WALSH
 v.
 WALLINGER.

Dec. 6.

On the one side it was argued, that the mother could make only a testamentary appointment: her power was to give and bequeath, and the instrument was not to take effect till after her death. In *Doe v. Thorley* (a), the word "leave" occurring in a power, was held to import that the appointment should be made by will. In *Kennedy v. Kingston* (b), where a sum of money was given to a woman for life, "and, at her death, to divide 1 in portions as she should choose to her children," a question was raised, whether an unappointed portion of the fund belonged exclusively to children living at her death: and Sir *Thomas Plumer* said "as the power is to be executed at her decease, it must be for the benefit of those capable of taking. It is, therefore, necessarily confined to children in existence at the time of her death." The principle of that case has since been approved and followed in *Needham v. Smith*. (c)

On the other hand, it was contended, that under the words of the testator's will, an interest vested in each child, liable only to be divested by a valid appointment, and therefore that the deceased child took an interest which was never divested: *Vanderzee v. Aclom* (d), *Boyle v. Bishop of Peterborough* (e), *Roper on Legacies*. (g) Besides, that deceased child might have had a valid appointment made to her. The authority of *Malim v. Keighley* (h), (afterwards reconsidered under the

name

(a) 10 *East*, 438.

(b) 2 *Jac. & Walk.* 451.

(c) 4 *Russ.* 318.

(d) 4 *Ves.* 771.

(e) 1 *Ves.* jun. 299.

(g) Vol. I. p. 537.

(h) 2 *Ves.* jun. 333. 529.

1830.

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 v.
 WALLINGER.

name of *Malim v. Barker (a)*), was directly opposed to the decision in *Kennedy v. Kingston*, and was not referred to in the argument of the latter case. Though the gift was not to come into possession till the death of the mother, she might have made an irrevocable appointment by deed in her lifetime. The words did not restrict the widow to an appointment by will; *Grace v. Wilson. (b)*

The MASTER of the ROLLS.

Unless the interest be expressly given over in case of no appointment, those children only will take who could take by appointment.

The power here was plainly testamentary, and could be executed only in favour of children who could take by will; and the part unappointed must be divided between the children who were living at the mother's death.

“Declare that the appointment of the trust fund in the pleadings mentioned, made by the will of *Matilda Wallinger* is void, and that the said trust funds are divisible between the Plaintiffs *Matilda, Charlotte, Mary Anne, Harriet, and Louisa*, and the Defendants *Anna Maria and Elizabeth Francesca*, the only children of the testator in the pleadings named, who were living at the death of *Matilda Wallinger*, except the Defendant *J. A. Wallinger*, in equal seventh parts,” &c.

Reg. Lib. 1830. B. 515.

(a) 3 *Ves.* 150.

(b) *Sugd. on Powers*, 219. 4th ed.

1830.

BROWNE v. BLOUNT.

ROLLS.

Dec. 8.

THE Plaintiff, being a judgment creditor of Sir *Charles Blount*, sued out a writ of *elegit* upon his judgment, and filed his bill for the purpose of equitable execution against certain real estates which were vested in trustees, upon certain trusts, under which Sir *C. Blount* was now entitled to the rents and profits during his life. The Defendants were the trustees in whom the estates were vested; a son of Sir *Charles Blount*, who had also an equitable interest under the trusts; and certain persons who, under a decree of the Vice-Chancellor, had obtained a charge upon the trust estate in respect of another judgment debt.

Where the person, whose interests are sought to be affected by the decree, is out of the jurisdiction of the Court, the suit cannot proceed in his absence.

Sir *Charles Blount* was now abroad, and had been abroad many years prior to the institution of the suit.

Mr. *Bickersteth* and Mr. *Hull* submitted, on the part of the Plaintiff, that as the legal estate was vested in the Defendants the trustees, the debtor himself was merely a formal and passive party, and the Plaintiff was therefore relieved from the necessity of having him before the Court. In *Cockburn v. Thompson* (a), Lord *Eldon* observed, that the rule, requiring all persons materially interested to be before the Court, had been dispensed with in a great variety of cases as to persons out of its jurisdiction; and that there were many instances of justice administered here in the absence of those, without whose presence, as parties, if they were within the jurisdiction, it would not be administered. In *Smith v. Hibernian Mine Company* (b), it is laid down,

(a) 16 *Ves.* 321. see p. 326.

(b) 1 *Scho. & Lef.* 233.

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down, that where persons interested are out of the jurisdiction, although the Court cannot compel them to do any act, it can proceed against the other parties, and if the disposition of the property is in the power of such parties, the Court may act upon it.

Mr. *Pemberton* and Mr. *Bethell*, for the trustees, contended, that the principle upon which it was impossible for a mortgagee to call for an account in the absence of the mortgagor or his heirs, according to the cases of *Fell v Brown* (a) and *Bradshaw v. Outram* (b), must equally apply to prevent the Plaintiff from proceeding with the present suit; since the only substantial relief sought by his bill was directed against an individual who had not come within the jurisdiction.

Sir *C. Wetherell*, Mr. *Combe* and Mr. *Bridger*, for other parties.

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The cause having stood over for a few days, that the cases upon the point might be farther examined, the following additional authorities were cited and commented upon: *Walley v. Walley* (c), *Heath v. Percival* (d), *Cowslad v. Cely* (e), *Rogers v. Linton* (g), *Darwent v. Walton* (h), *Attorney-General v. Balliol College* (i), *Williams v. Whinyates* (k), *Thompson v. Topham* (l), *Redesdale on Pleading* (m). The Plaintiff's counsel also referred to the cases of *Curling v. Marquis Townshend* (n), and *Tanfield v. Irvine* (o) as shewing, that even if the Court

(a) 2 Bro. C. C. 276.

(b) 13 Ves. 234. *Farmer v. Curtis*, 2 Sim. 466.

(c) 1 Vern. 484.

(d) 1 P. Wms. 682.

(e) Prec. Ch. 83.

(g) Bunb. 200.

(h) 2 Atk. 510.

(i) 9 Mod. 407.

(k) 2 Bro. C. C. 399.

(l) 1 Y. & Jerv. 556.

(m) Page 172. 4th edit.

(n) 19 Ves. 628.

(o) 2 Russ. 149. *Coward v. Chadwick*, ibid. 150. n.

Court could not grant all the relief prayed, it would at least go the length of appointing a receiver.

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The MASTER of the ROLLS stopped the cause, stating that *Sir Charles Blount* being the person whose interests were sought to be affected by the decree, the suit could not proceed in his absence. (a)

(a) So *Roveray v. Grayson*, 3 Swan. 145 n. *Stratton v. Davidson*, 1 Russ. & Myl. 484. Lord *Eldon* appears to have sanctioned some relaxation of the strict rule in cases of interpleader; see *Stevenson v. Anderson*, 2 Ves. & B. 407. *Martinus v. Helmuth*, ibid. 412. 2d edit.

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Dec. 10.

HOPKINS v. MYALL.

Where, on marriage, a settlement is made of the wife's property to herself for life, to her separate use, with remainder as she should appoint, by any writing signed by her, and attested by two witnesses, and for default of appointment to the children of the marriage, and the trustees part with the trust fund upon the joint application of the husband and wife, by letter not attested by any witness, the trustees, after the death of the wife, must make good the trust fund for the children.

UPON the marriage of Mr. and Mrs. *Myall*, certain property of the wife was assigned to trustees, upon trust for the wife during her life, for her separate use, with remainder as the wife should appoint by any writing under her hand attested by two witnesses; and for default of appointment, then, after the death of the wife, to the children of the marriage in manner therein mentioned.

The trustees, upon an application of the husband and wife, made by letter signed by both of them, but not attested, parted with the trust fund to the husband. The wife died without having made any other appointment of the fund.

The present bill was filed by the children after the death of the mother, to charge the trustees for a breach of trust, and to compel them to replace the fund.

Mr. *Bickersteth* and Mr. *Jacob*, for the Plaintiffs.

Mr. *Rolfe* and Mr. *Pattisson contra*, submitted that this was analogous to the case of an informal appointment, which, though not executed strictly according to the power, would nevertheless be referred to it, and be upheld as an effectual execution in equity, provided the intention to dispose of the fund was clearly manifested; *Blake v. Marnell* (a), *Routledge v. Dorril*. (b). The general rule was, that if a trustee, who holds a fund in his hands,

(a) 2 Ba. & Be. 35.

(b) 2 Ves. jun. 357.

hands, pays it over to a third party by the direction of the *cestui que trust*, such payment cannot be afterwards recovered back from the trustee, and no authority could be found which raises any exception in favour of a feme-covert; *Pollard v. Greenoil* (a), *Wright v. Englefield* (b), *Moodie v. Reid*. (c)

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The ceremonies required by the settlement were introduced for the express purpose of protecting the wife against the influence of the husband, and are matters of substance, and not of form; and without an adherence to those ceremonies the interests of the children could not be defeated. (d)

(a) 1 *Ch. Ca.* 10.

(b) *Amb.* 468.

(c) 1 *Mad.* 516.

(d) *Cocker v. Quayle*, 1 *Russ. & My.* 535.

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11. 22.

KENDALL v. BECKETT.

In a suit by a purchaser to compel specific performance of a contract for the sale of a reversionary interest in stock, or in the alternative, to have the deposit repaid, the Court having decided against the Plaintiff's right to the principal relief sought, refused the alternative part of the prayer, and dismissed the bill with costs.

THIS was a suit, instituted by the purchaser of a reversionary interest in a sum of stock, against the executors of the vendor, and against several other parties interested in the fund, for the purpose of enforcing a specific performance of the contract. In the event of the Court refusing that relief, the bill prayed, in the alternative, that the Plaintiff might be declared to be a creditor of the Defendants, the executors, to the amount of 25*l.*, the sum which he had paid by way of deposit on his purchase.

The Vice-Chancellor having dismissed the bill with costs, the Plaintiff appealed to the Lord Chancellor.

Mr. *Knight* and Mr. *M'Dougall* for the Appellant, contended, that, upon the result of the evidence in the cause, the price obtained was ample, and the whole transaction stood clear and above suspicion. The sale had taken place under circumstances which made it equivalent to a sale by auction, so that the purchaser was relieved from the burthen of proving the adequacy of the consideration; *Shelly v. Nash* (a). That the great rise in the value of the property sold, consequent upon the death of the tenant for life of the stock shortly after the transaction took place, did not affect the validity of the sale, was clear, upon the principles laid down in *Jackson v. Lever* (b), and *Kenney v. Wexham* (c); and the decisions in *Doloret v. Rothschild* (d), and *Adderley v. Dixon* (e),

satis-

(a) 3 *Madd.* 252.(b) 3 *Bro. C. C.* 605.(c) 6 *Madd.* 355.(d) 1 *Sim. & S.* 510.(e) 1 *Sim. & S.* 607.

satisfactorily shewed that equity would decree the specific performance of a contract of which the subject matter was a chose in action.

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If, however, on examining the evidence, the Court should be of opinion against the Plaintiff's right to a specific execution of his contract, he would then be clearly entitled to a decree for repayment of his deposit. This alternative relief was expressly asked by the prayer, which was purposely so framed in order to avoid a circuity of actions, and to enable complete justice to be done between the parties, an object which courts of equity were always anxious to attain. To that extent, at least, the Vice-Chancellor's decision must be reversed. *Denton v. Stewart* (a), and *Greenaway v. Adams* (b), were authorities for such a decree.

The *Solicitor-General*, Sir E. Sugden, Mr. Agar, Mr. Skirrow, Mr. Rose, Mr. Hayter, Mr. Kindersley, Mr. Bethell, and Mr. Milford, appeared for different Defendants.

They cited and relied upon *Peacock v. Evans* (c), and *Gowland v. De Faria* (d), where Sir W. Grant considered it to be perfectly settled, that the purchaser of a reversionary interest, seeking to enforce his bargain, was bound to shew that a full and adequate consideration had been paid. In the present instance, the Plaintiff had utterly failed in making out that point, and it was unnecessary to enter into the other questions that had been raised. *Shelly v. Nash* was over-ruled by *Fox v. Wright*. (e)

The

(a) Reported in the note to
Todd v. Gee, 17 *Ves.* 276.
(b) 12 *Ves.* 395.

(c) 16 *Ves.* 512.
(d) 17 *Ves.* 20.
(e) 6 *Madd.* 111.

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The LORD CHANCELLOR held it to be clear, as laid down by Sir *W. Grant* in the cases referred to, that where the purchaser of a reversionary interest sought the assistance of the Court, the burthen was imposed on him of shewing that the transaction had been in all respects fair, and that a full and adequate consideration had been given. So far from the Plaintiff having complied with that exigency in the present instance, there was a preponderating weight of evidence tending to prove that the price had been inadequate. Without going into the particular details of that evidence, or computing the exact quantum of inadequacy, it was enough to say generally that the Plaintiff had altogether failed in making out a case for the interposition of the Court. The main object of the suit having thus signally failed, there only remained to be disposed of the question raised by the alternative part of the prayer, asking repayment of the deposit as a debt. In a case, however, where the sum was so very small, and where it was admitted moreover that no demand had been ever made, the Court would be extremely slow in acceding to such a claim; especially in favour of a party whose conduct was tainted with unconscientious dealing. Even under circumstances entitled to favour, the jurisdiction was at best extremely doubtful. The language of Lord *Eldon* in *Todd v. Gee (a)*, speaking of *Denton v. Stewart* (which had been cited in the case under appeal), distinctly shewed the opinion of his Lordship, that, except in a very special case indeed, the species of relief prayed in the alternative by this bill ought never to be granted, and no such case was now presented to the Court.

Dec. 22.

His Lordship on a subsequent day observed, that it had always been held to be a sound rule of practice,
 and

(a) 17 *Ves.* 273.

and it was one from which he was not disposed to depart, that a Plaintiff should not be permitted to introduce into a corner of a bill some secondary and trivial claim, on which, if it stood alone, he might be entitled to succeed, in order as it were to catch a decree on a minor point, in the event of his failing in the main object of the suit. The prayer for the restitution of the deposit money he considered to come within this description. The decree, therefore, must be affirmed generally, and the bill be dismissed with costs.

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HANDFIELD v. WILDES.

Dec. 13.

MR. DIXON moved that the serjeant at arms should be directed to bring up a Defendant to answer his contempt.

The party against whom the application was made was one of several Defendants; after entering an appearance he had gone abroad out of the jurisdiction, and the Plaintiff now wished to proceed to take the bill *pro confesso* as against him, under the provisions of the 1 W. 4. c. 36.* The motion was supported by the affidavit of

To ground an order for the serjeant at arms under the 1 W. 4. c. 36. s. 15. rule 1. the affidavit must state the party's belief that at the time of suing forth the attachment the Defendant was in the county into which the writ was issued, and not merely that his last known place of residence was in that county.

* The first rule of the fifteenth section of the act, upon which the question arose, is as follows:—“That when a writ of attachment shall have duly issued against any defendant for contempt in not answering the bill, and such defendant shall not have been taken under such writ, and the sheriff of the county into which such writ

shall have issued, shall make a return of *non est inventus* to the same, the Court shall, upon motion by or on behalf of the Plaintiff (notice of which shall not be required), order that the serjeant at arms attending the Court do apprehend such defendant, and bring him to the bar of the Court to answer his contempt; and the same proceedings

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 {
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the managing clerk of the Plaintiff's town agent, by whom the writ was sued out. The affidavit stated that the writ of attachment was regularly issued, on the Defendant being in contempt for not putting in his answer; that a return of *non est inventus* was thereupon made by the sheriff; that all due diligence had been used to ascertain the Defendant's place of residence at the time when the writ was issued, and to apprehend him by virtue thereof; and that at that time the Defendant's last and only known place of abode was in the county of *Middlesex*, the county into which the writ was issued.

The LORD CHANCELLOR was inclined to think that an affidavit made by the town agent's managing clerk, he being the person to whom the duty of making such inquiries was generally committed, might perhaps be a sufficient compliance with the exigency of the statute; but it was not necessary to decide that point, as he considered the affidavit to be clearly defective, in not swearing to the party's belief that the Defendant was in the county at the time of the issuing of the writ; an omission which was by no means supplied by the statement, that at that time the Defendant's last and only known place of abode was in the particular county into which the writ was issued. He therefore refused the motion.

ceedings may thereupon be had as if such order had been made in the manner heretofore in use; provided that before such order shall in any such case be made, the plaintiff applying for the same shall be required to satisfy the Court by the affidavit of the solicitor of the plaintiff, or of his town agent, if the writ of attachment was issued by such town agent, that due diligence

was used to ascertain the place where such defendant was at the time of issuing such writ, and in endeavouring to apprehend such defendant under the same; and that the person suing forth such writ verily believed at the time of suing forth the same, that such defendant was in the county into which such writ was issued."

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WRIGHT v. GREEN.*

1833.

Jan 25, 26. 28.

SIR *E. Sugden*, and Mr. *Spurrier* moved, that the Defendant *Green*, who had been taken into custody by the sergeant at arms under the provisions of the 1 *W. 4. c. 36. s. 15.*, might be discharged, on the ground that his commitment was irregular. The affidavit on which the order for the sergeant at arms proceeded, was sworn by the Plaintiff's town agent, he having been the person by whom the writ of attachment was sued out. It stated, that due diligence had been used to ascertain the place where the Defendant was at the time of issuing the writ, and in endeavouring to apprehend him under it: it also stated the agent's belief, that at the time the writ was sued out, the Defendant was in the county into which the same was issued; and it set forth *verbatim* the copy of a letter which the Defendant had received from the officer employed in executing the writ, and in which the particulars of two unsuccessful attempts to arrest the Defendant were detailed in a rather confused and obscure way. The affidavit, moreover, swore to the agent's belief that the contents of the letter were true, but it did not state, in terms, that he believed that due diligence had been used in endeavouring to apprehend the Defendant. The sheriff having made a return of *non est inventus* to the writ, the Vice-Chancellor, upon reading the affidavit above stated, considered it to be sufficient, and directed the sergeant at arms to go.

To ground an order for the serjeant at arms under the 1 *W. 4. c. 36. s. 15.* rule 1. the affidavit need not state the party's *belief* that due diligence has been used in ascertaining the Defendant's residence, and in endeavouring to apprehend him; but it must swear to those facts, and in some way or other satisfy the Court of their truth.

In support of the motion, it was insisted that such an affidavit ought not to have satisfied the Court. It was not

* This case is inserted here in consequence of its connection with the question discussed in *Handfield v. Wildes*.

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not enough to swear that due diligence had been used, unless circumstances were detailed with respect to the execution of the attachment, proving that something more had been done than a mere formal compliance with the exigency of the statute. The agent should, at least, pledge his oath to his own belief, that all due diligence had been used. The statements in the letter, which was written by an illiterate person, could not be evidence, and were any thing but clear and satisfactory. They were the statements of a man, interested in giving a favourable account of his own activity, in order to enhance his merits.

Mr. *Rolfe*, and Mr. *Stuart* submitted that the agent had done every thing prescribed by the rule, and every thing which it was possible for him to do without going in person to the country, and accompanying the bailiff in his attempts to serve the attachment: and if that were to be required of the solicitor, the statute would soon be a dead letter. The agent could know nothing personally of the sheriff's officers, over whom he had no kind of control: and all, therefore, which the act required was, that he should take care that the writ was properly sued out and sent down in due course to the sheriff, and that he should satisfy the Court of that fact by his oath.

Jan. 28.

The LORD CHANCELLOR [after stating the circumstances of the case, and reading the words of the enactment]. In order to warrant the order, the Court must be satisfied of these two facts; first, that due diligence has been used to ascertain the residence of the party; and, secondly, that due diligence has been used in endeavouring to apprehend him: and of this it can be satisfied in one way only, viz. by the affidavit of the Plaintiff's solicitor, who sued out the writ; or if it were sued out
by

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by the town agent, then by the affidavit of that agent, swearing to the facts. But it is necessary for the affidavit to *satisfy* the Court; and whatever else it may contain, beyond the swearing to these naked facts, can only be brought forward with a view to affording the required satisfaction. It was contended that something more than this should be done, namely, that the party making the affidavit, should swear to his *belief* that due diligence had been used to ascertain the Defendant's residence. But that is no part of the exigency of the rule; on the contrary, where the party's belief is required to be sworn to, as in the subsequent clause, with respect to the Defendant being in the county into which the writ was issued at the time when it was sued forth, that is so stated in express terms; and the difference in the language of the two clauses leaves no room for conjecturing what the intention of the legislature might have been.

The question then comes to be here, as it must be in every other case, whether the solicitor who has made affidavit to circumstances, though not within his own knowledge, and who has also complied with the exigency of the rule, in swearing to his belief that the Defendant was in the county when the writ was sued forth, but who has not sworn, as he was not required, to his belief that due diligence was used, — whether that solicitor has not disclosed circumstances sufficient in reason to satisfy the Court that such diligence has really been used? The mode in which he has attempted to do so, is by setting forth in his affidavit a letter, received, as he swears, from the officer who endeavoured to make the caption, and in which the writer relates a number of particulars, the whole of which, taken together, satisfied the Court below, and I think correctly, that due diligence had been used: and he swears, moreover, to his belief, that the contents

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contents of that letter are true. It is said, indeed, that the letter might have been more precise and particular in its statements; but, I must look at the whole of the affidavit together: and, although I admit that it might have been more satisfactory, I am still disposed to think, that, standing as it does quite uncontradicted, it ought to be deemed sufficient.

The case of *Miller v. Bennet*, with a note of which I have been furnished, turned upon circumstances entirely different. There was no question there, as to the propriety of the original order; but, an application was made before the Vice-Chancellor to have it set aside, upon further affidavits, shewing that the Court had been imposed upon. In the present case, the motion is to discharge His Honor's order, on the ground of its having improperly issued in the first instance, and therefore I am not at liberty to take into view the affidavit subsequently made by the Plaintiff's wife, contradicting the statements in the letter. The motion must be refused with costs.

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WEAVER v. MAULE.

ROLLS.
Dec. 13. 17.

THE Plaintiff, being seised to him and his heirs of a certain tenement according to the custom of the manor of *Taunton Dean*, in the county of *Somerset*, borrowed the sum of 700*l.* of one *John Ball*, and for securing the repayment of the same, he, on the 12th of *May* 1824, duly surrendered the tenement into the hands of the lord of the manor, to the use and behoof of *John Ball* and his heirs and assigns for ever, according to the custom of the manor, subject nevertheless to the trusts, declarations, and agreements mentioned and contained of and concerning the tenements, in a certain indenture, bearing even date with the surrender, and made between the Plaintiff of the one part and *John Ball* of the other part. Upon this surrender *John Ball* was duly admitted. By the indenture therein referred to, it was agreed between the Plaintiff and *John Ball* that the tenement should be held and enjoyed by *Ball*, his heirs and assigns, according to the custom of the manor, upon trust that *Ball*, his heirs and assigns, might at any time, after giving one year's previous notice in manner therein mentioned, sell and dispose of the tenement, and, by and out of the monies arising from such sale, and the rents and profits of the premises in the meantime, in the first

Where a lord of a manor admits a tenant upon the trusts of an indenture referred to in the surrender, he is to be considered as consenting to those trusts, and is bound by them upon the death of the trustee without an heir.

A. being seised of a copyhold in fee, surrendered it to the use of *B.* and his heirs, according to the custom of the manor, but subject to the trusts of a certain indenture therein referred to; these trusts were, after giving one year's previous notice,

to sell the tenement, to retain out of the proceeds of the sale a sum of 700*l.* and interest, for which the surrender was a security, and to pay the overplus to *A.*; *B.* was admitted, and died intestate and without an heir, the 700*l.*, with an arrear of interest, still remaining due to him:

Held, that the lord did not become entitled to the tenement by reason of failure of heirs of *B.*, and that *A.* had a right to redeem the premises, and, upon payment of what was due on the mortgage, to be readmitted as tenant in fee according to the custom of the manor:

That it was the personal representative of *B.*, and not the lord, who was entitled to receive the mortgage debt.

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place pay and discharge all rates, taxes, and lord's rents, and all expenses to be incurred in keeping the premises in repair, and in assuring the same against fire, and all expenses incurred in the sale, and should, in the next place, pay off and discharge the sum of 700*l.*, and all interest due thereon, and should pay over the surplus monies, if any, to the Plaintiff, his executors, administrators, and assigns.

In the month of *August* 1825, *John Ball* died intestate and without an heir; and administration of his personal estate and effects was granted to the Defendant *George Maule*, on the nomination of the crown.

The mortgage premises had not been sold, nor had any notice been given by *Ball*, in his lifetime, of an intention to sell them, and at his death the sum of 700*l.*, with an arrear of interest, remained due to him. Soon after the death of *John Ball*, *William Kinglake*, the lord of the manor of *Taunton Dean*, caused proclamation to be made at three several courts for the heir of *John Ball* to come in to be admitted to the tenement; and, no heir having appeared, he issued a warrant of seisin of the tenement, claiming to be entitled to the same by reason of the failure of heirs of *John Ball*. The Plaintiff then filed the present bill against *William Kinglake* and *George Maule*, praying to have it declared that he was entitled to the equity of redemption of the copyhold tenement.

There were two questions in the cause.

I. Whether, under the circumstances, the Plaintiff had an equity of redemption as against the lord, and was entitled, upon payment of the 700*l.* and interest, to be re-admitted to the copyhold tenement.

II. If

II. If the mortgagor had a right to redeem, who was entitled to receive the mortgage money; the lord, or the personal representative of the mortgagee.

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Mr. *Bickersteth* and Mr. *Jacob*, for the Plaintiff.

Mr. *Tinney* and Mr. *B. Parry*, for the lord of the manor.

For the Plaintiff it was argued that this, though in form a trust for sale, was substantially a mortgage; and that, as in the analogous instance of freehold estate escheated to the crown, the lord must take the property subject to the rights of the mortgagor; and the same rule applied if the conveyance were considered as a trust; *Paulett's case* (a), *Attorney-General v. Reeve*. (b) It was clear from the judgment of Lord *Mansfield* and Sir *Thomas Clarke*, in *Burgess v. Wheate* (c), that a mortgage escheats, subject to the equity of redemption, and that the mortgage money must be paid to the personal representative of the mortgagee; *Attorney-General v. Henchman*. (d) If the circumstance of the premises being copyhold created any difference, still the peculiar form of this surrender and admittance preserved the Plaintiff's equity as against the lord, and brought the case exactly within the principle of Lord *Mansfield's* observation, that if the lord "consents to a condition or trust on the court roll, then he is bound by it, for he cannot claim against his own act." (e)

On the other hand, it was contended, on behalf of Mr. *Kinglake*, that the conveyance was not a mortgage, but a trust for sale; and that, as the premises in question were of copyhold tenure, the rules and decisions with respect

(a) *Hard.* 465.

(b) 2 *Atk.* 223.

(c) 1 *Ed.* 177. 1 *W. Black.* 123.

(d) 2 *Sim. & St.* 498.

(e) 1 *Eden*, 232. *The King v.*

Haddonham, 15 *East*, 463.

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respect to freeholds escheating to the crown had no application. It was a settled principle that the lord of a manor could not be affected by any trust to which he was not an assenting party; *Peachy v. Duke of Somerset* (a), *Howard v. Bartlet*. (b) The entry of the trust upon the court rolls was the unauthorised act of the steward, unknown to the lord, who ought not therefore to be bound by it; especially as upon the recent cases it was extremely doubtful whether, if a tenant made an application for that purpose, the steward had any power or discretion to refuse compliance. (c)

Mr. Wray, for the crown.

The MASTER of the ROLLS.

In the case of fee simple lands, the lord, taking by escheat, is subject to the charges and incumbrances of the tenant, because the tenant has full power to create them without the consent of the lord. But in the case of copyholds and customary freeholds, where the title depends upon admission, the lord, taking by escheat, is not subject to the charges and incumbrances, or alienation of the tenant, unless by act of admission he has expressly assented to them. In the present case the tenant surrenders the land into the hands of the lord, to the intent that a new tenant may be substituted in his place, subject to the trusts, declarations, and agreements expressed in a certain indenture, referred to in the surrender; and when the lord admits the new tenant upon such surrender, he is to be considered as thereby assenting to the qualified nature of his tenure, and cannot afterwards claim against those trusts, declarations, and agreements, to which he has thus given his consent.

Whether

(a) 1 *Strange*, 447. vi. *Vin. Ab.* (c) See 1 *Watk. Copyh.* 2d ed. 113. 1 *Watk. Copyh.* 2d ed. 276. 272. n.
 (b) *Hob.* 181.

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Whether he were, or were not, actually acquainted with the nature of the trusts and agreements contained in the indenture, is immaterial. The terms of the surrender gave him full notice of the trusts, and it was his duty to inform himself of their nature.

The lord, in this case, therefore, being to be considered as bound by the trusts of the indenture, becomes himself a trustee for the purpose therein mentioned, and the Plaintiff, as against the lord, is entitled to the usual decree to redeem, inasmuch as the equity of redemption still subsists under the indenture, no notice having been ever given by the mortgagee, so as to acquire the right of exercising the power of sale.

The question remains between the lord and the Defendant, the personal representative of *John Ball*, which of them is to receive the money to be paid by the Plaintiff upon the redemption. The lord, having by his admission upon the surrender consented to the mortgage, it follows that the mortgage money is part of the personal estate of the mortgagee, and is to be received by his administrator.

The decree must, therefore, be to continue the injunction restraining the lord from all further proceeding at law, to recover possession of the customary tenement; to declare that the Plaintiff is entitled to redeem as against both Defendants; to direct the usual account of what is due upon the mortgage, and that, upon payment of what shall be so found due to the Defendant, the administrator of *Ball*, the lord do regrant the tenement to the Plaintiff, to be held to him and his heirs, according to the custom of the manor, as upon his former admission, he paying to the lord, or his steward, the fine and fees due upon his admission. Considering the novelty of the case, let the decree be without costs.

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Dec. 21.

GRONOW v. EDWARDS.

A modus payable by every householder, in lieu of all tithes of hay, without regard to the fact whether such householder has or has not hay, is valid, but otherwise if it be alleged to be payable only when the householder has hay.

Sixpence in lieu of a tithe pig is rank: a modus for fruit and garden-stuff is good, though it be not alleged to be growing in a garden.

THIS was a bill by the vicar of the parish of *Cadoxton-juxta-Neath*, in the county of *Glamorgan*, against the Defendant, who was an occupier of lands within a particular district of that parish, and was also entitled to the rectorial tithes in that district.

The principal question respected the tithe of hay. The Defendant, in his answer, insisted upon a modus to the effect following: "Every householder inhabiting within the parish is to pay, for and in lieu of the tithe of all hay made and carried on or from any of the lands within the said parish, in the tenure of each occupier, be the quantity great or small, as well for two or more farms or tenements as for one, the annual sum of one penny," &c. And in a subsequent part of his answer he used the following words: "That the sum of one penny hath, as he believes, from time immemorial been paid to and received by the vicar of the said parish for the time being, for or in lieu of the tithe of all hay whatever, made and carried by each of the occupiers of the lands within such parish, upon and from off the said several lands."

Mr. *Agar*, Mr. *Duckworth*, and Mr. *Hunt*, for the Plaintiff.

This modus is not alleged with sufficient clearness and precision. It leaves the vicar in doubt whether this customary payment is to be received from every householder within the parish, or from every householder who occupies lands within the parish, or from every householder occupying lands on which there is

hay. In substance the modus stated is a payment of one penny by each householder inhabiting within the parish, in lieu of the tithes of hay grown on lands occupied by him. Such a modus is void, because it is uncertain, and liable to changes and fluctuations which may altogether annihilate it as a provision for the vicar. If the lands on which hay is grown are in the occupation of one hundred persons this year, and of only one person in the next, the vicar will receive in the one case one hundred pennies, and in the other, a single penny only. On this principle, in *Blackburn v. Jepson* (a), a modus of one penny in lieu of the tithe of hay of every inhabitant or occupier of a house, and having any land at or belonging to, or used or enjoyed with any house, was held, by Lord *Eldon*, to be invalid. In *Travis v. Oxton* (b), the defence set up to a claim of tithe of hay, was an ancient usage to pay a penny for every house having lands belonging to it, without specification or regard to quantity; the Court of Exchequer held, that such a modus could not be supported, because it was a recompense for tithe wholly uncertain, fluctuating in its amount, shifting according to the changes in the occupation of lands, and liable to be reduced to a single penny, if not to be wholly annihilated: and the House of Lords upon appeal sanctioned this doctrine. In *Busk v. Lewis* (c), a modus of one penny payable by every occupier of land, in lieu of tithe of hay, was held to be bad.

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There is a case of *Bennett v. Read* (d), which has sometimes been cited as proving that a modus may be good, though liable to the objection now raised. Lord
Eldon

(a) 17 *Ves.* 473. and 3 *Swans.* 132. the name of *Whitehead v. Travis*, 7 *Bro. P. C.* ed. *Toml.* 49.

(b) 3 *Wood.* 523. 3 *Gwill.* (c) *Jac.* 363.

1066. 1 *Anstr.* 308. n. under (d) 4 *Gwill.* 1272. 1 *Anst.* 322. n.

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Eldon (a) considered that, in *Bennett v. Read*, if an occupier parted with the land and retained the house, he was liable to pay: so that the customary payment was due from every occupier of a house, whether he held the land along with it or not, and therefore could not be affected by the consolidation of the lands in the hands of a few individuals, though it might vary with the number of inhabitants. But if the doctrine of *Bennett v. Read* be different from that laid down in *Truvis v. Oxton*, the latter, as Lord *Eldon* has distinctly stated, must prevail, since it is the authority of the House of Lords. (b)

Mr. *Bickersteth* and Mr. *Tennant*, for the Defendant.

Bennett v. Read is a case of the highest authority: it was most elaborately argued by counsel of great name, among whom were Mr. Serjeant *Hill* and the late Lord *Redesdale*, and it was most solemnly decided by very able Judges. There the modus was "That every person being a householder inhabitant within the parish, and occupying a messuage, cottage, garden, orchard, yard, land, meadow, pasture, or marsh ground, within the same, has, from time whereof the memory of man runneth not to the contrary, paid, and been used and accustomed, and of right ought to pay to the vicar of the said parish, for the time being, the sum of 2*d.* at the feast of *Easter*, &c., in lieu and full satisfaction of all and singular the tithe of herbs, roots, flowers, apples, pears, nuts, and other fruits, in or upon any garden, orchard, or yard, occupied by such person within the parish, yearly growing, arising, and renewing, and of all wood, cuttings, toppings, and croppings of trees, cut in such year upon land occupied by such person within the parish; and of all herbage and agistment of barren and unprofitable cattle kept, fed, and depastured by such person

(a) 3 *Swans*. 156.

(b) 3 *Swans*. 152.

person in the parish in such year." In *Bennett v. Read* the payment was by every person being a householder inhabitant, in lieu of tithes of herbs, &c., growing in any garden occupied by him: here it is a payment by every householder inhabitant in lieu of the tithe of hay on lands in the tenure of each occupier, that is to say, in the tenure of such inhabitant householder. There is no substantial difference between the two cases. Looking at the words in which the modus is laid in *Bennett v. Read*, it is not easy to see how the payment could be considered as attaching upon every inhabitant householder, whether he occupied any garden or not, since it is expressly stated to be in lieu of herbs, &c., in any garden, &c., *occupied by such person*. But if the words used there admitted of such a construction, it is an express authority for saying that the words used here may receive a similar interpretation, and are a sufficient allegation of a modus valid in law. Moduses, not unlike the present, were established in *Hockmore v. Richards*. (a) *

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(a) 1 Wood, 485.

* It is clear from the language of Baron Eyre, that his judgment in *Bennett v. Read* proceeded on the ground, that the customary payment was due from every householder, whether occupying land or not. "There is," says he, (4 *Gwill.* 1290.) "this inequality in this modus, that a mere inhabitant householder, without a foot of land, pays as much as the inhabitant householder who occupies the largest farm in the parish; and there is this appearance of its being unreasonable, that the mere inhabitant householder seems to pay for tithes where he has not all the tithable matters for which his payment is

a satisfaction." Again, "The inhabitant householders have entered into a composition with the vicar of these tithes for a money payment, rated upon them in their character of inhabitant householders, with perfect equality." In another part of his judgment he says, "Here there is a fixed and certain recompence (for so we have held the payment of 2d. by the name of *hearth-silver*, &c. by every inhabitant householder to be,) for all the tithes of the particular species due from all the inhabitant householders within the district."

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The MASTER of the ROLLS.

If this modus had been distinctly pleaded as payable by every householder within the parish in lieu of the tithe of hay, without regard to the fact, whether such householder had or had not hay, then, whatever I might have thought of such a modus, if the point had been unprejudiced by decision, I should have been bound by the case of *Bennett v. Read* (a), the authority of which is not denied by Lord *Eldon*, in *Blackburne v. Jepson* (b), to have declared that the modus was valid. Those who set up a modus against the acknowledged right of the vicar to the tithe of a particular article, are bound to state with certainty the nature of the modus. I cannot collect with certainty here that the Defendant means to assert, that the householder is to pay the modus, without regard to the fact, whether he has or has not hay: and indeed his own counsel give a different construction to his allegations, and consider that no tithe is payable by the householder unless he has hay. In such circumstances the vicar is entitled to a decree for the tithe of hay in kind.

Another modus insisted on was the following: "to pay for pigs, whether few or many, one pig for tithe in kind or 6d. in lieu thereof."

The MASTER of the ROLLS held, that this modus was bad; 6d. in lieu of a tithe pig being rank.

He also held, that a modus of one penny for fruit and garden-stuff was good, though not pleaded to be for fruit and garden-stuff growing in a garden.

(a) 4 *Gwill.* 1272.

(b) 3 *Swanst.* 132.

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ATTORNEY GENERAL v. SIBTHORP.

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DR. *SIBTHORP* by his will, bearing date the 21st of *July* 1797, and duly executed, devised all his estates in several counties, which he enumerated, and also his ground and fee-farm rents to his son, *Humphrey Sibthorp*, for life, without impeachment of waste, remainder to trustees, to preserve contingent remainders; remainder, after the decease of *Humphrey Sibthorp*, to his first and other sons successively in tail male, with divers remainders over. The testator then made certain devises and bequests for the benefit of his daughters, *Lady Sewell* and *Mrs. Cholmeley*, and their families, and proceeded in these words: — “And whereas the quay at *Instow*, and several cellars and warehouses, and houses adjoining, built on the premises, together with the pottery, and altogether in the parish of *Instow* and *Fremington*, I hereby bequeath to my son *Humphrey Sibthorp*, conditioned of his bringing up one of his sons into a mercantile line, under such merchants in any capital trading place, *London, Liverpool, Hull, Bristol, &c.*; or in default of such, should my son *Cholmeley* prefer such a situation to any of his sons, as within two years after my decease should be determined upon and required by one or more of the above said trustees of my son *Humphrey Sibthorp*, who are hereby required to receive the profits of the said estates in the respective parishes at *Instow* and *Fremington*, towards defraying the expenses of such appointment for the mercantile line, apprehended as suitable and commodious as any in the West of *England* for trade in general; providing for either not less than the sum of 500*l.* for the clerkship or apprenticeship, and at the age of twenty-three years the

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Conditional bequest, “to the fellows and demies of *Magdalen College, Oxford*,” upon the happening of a particular event, held void for uncertainty; the language of the condition, and the description of the legatees being so loose and obscure, that the Court was unable judicially to collect the intention of the testator with respect either to the individuals who were to take, or the time and manner of their taking.

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net sum of 400*l.* payable at the four quarterly days, *Midsummer, Christmas, Lady-day, and Michaelmas*, 100*l.* each quarter for embarking into such a mercantile line of merchandize, as in the opinion and recommendation of the aforesaid trustees, or majority, in concert with their respective parents, if living, or assigns, which trustees are hereby likewise empowered, as well as their assigns, for the preservation of the contingent uses, herein noticed and specified, from being defeated and destroyed, and for that purpose to make entries or bring actions, as the case requires, on the estate at *South Leigh*, for the due performance of establishing of such a mercantile line as either, first, in the option of my son *Humphrey Sibthorp*, and on his refusal, of my son *Montague Cholmeley*; if declined by both, after due notice given to each within two years after my decease, as required of one or more of the above trustees, by the parents or guardians of such children, my will and order is, that the above limited sums should be claimed and paid for the above limited term of three years, viz. 100*l.* quarterly, as well as 500*l.*, to the fellows and demies of *Magdalen College, Oxford*, who, in default of non-performance, I hereby will shall have an equal right with the above trustees to preserve the contingent uses, hereby thus limited, from being defeated or destroyed: and further, for the establishment of such son as shall *bond fide* engage in the mercantile line, my request and will is, my estate of *Fullincot*, with its appendage, together with the quay and several warehouses, heretofore employed, shall be granted on a lease during the life and residence of whatever grandson may be fixed for the above purpose, together with the manorial rights and privileges of the manor, as his residence and occupancy, at least six months every year, determinable on the decease of such grandson, unless

such

such should leave male issue lawfully begotten, and bring up such son in the mercantile line, when my will is, the like should enjoy and possess the aforesaid *Fullincot* and appurtenances, the quay, warehouses, and manorial rights and privileges, as hereby granted to his father under the like limitations; otherwise the whole to fall into the possession of my right heirs." The testator appointed his son, *Humphrey Sibthorp*, to be his executor and residuary legatee.

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The testator died soon after the execution of his will. *Humphrey Sibthorp* the son died in the year 1815, leaving the Defendant, *C. W. Sibthorp*, his eldest son and heir at law.

The suit was instituted by the President and fellows of *Magdalen College, Oxford*, against the devisee and personal representative of *Humphrey Sibthorp*; alleging that inasmuch as neither *Sibthorp* nor *Cholmeley* had availed himself of the option to bring up a son in the mercantile line, the contingent legacies payable in that event had failed, and that the gift over to the fellows and demies of *Magdalen College* took effect. When the cause first came on, the Vice-Chancellor referred it to the Master, to inquire whether there was any corporate body in *Magdalen College, Oxford*, answering the description of fellows and demies; and if not, what was the constitution of the college, and who were its component members. The Master reported that there was no corporate body in *Magdalen College* answering that description, but that the corporate name and style of the college was "The President and Scholars of *St. Mary Magdalen College*, in the University of *Oxford*," and that its component members were a President, forty fellows, thirty scholars called demies, a steward, four chaplains, eight lay clerks, an organist, sixteen choristers, a school-

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no less than 109 persons would, according to the finding of the master, be entitled to share in the benefit of the legacy, the annual amount of which, if distributed rateably among such a number, could not exceed a few shillings annually to each. This, besides, is not the devise of a rent-charge, but a pecuniary legacy given as a gross sum, and it would be doing violence to the language of the will, no less than to probability, to treat it as a gift in perpetuity. If, on the other hand (which is the more natural supposition), the legacy was intended as a personal bounty to the fellows and demies of the college, and not to them and their successors in all time to come, the case stands quite untouched by the *Attorney-General v. Tancred (a)*; for it must then be confined

(a) 1 Ed. 10. Amb. 351. Some doubt having been suggested with respect to the accuracy of the report, the Lord Chancellor directed the registrar's book to be examined, when it was found that the devise over ran thus:—"Provided, that if the act for preventing the disposition of lands, whereby the same become inalienable, should impede the premises devised to the said twelve students and twelve pensioners from taking effect, then and not otherwise he devised all the said premises to the said thirteen fellows of *Christ's College*, and the said fellows of *Gonville* and *Caius College*, and the scholars of both colleges, each fellow to have a double proportion of the said rents and profits to every scholar." In a subsequent part of the will, the testator nominated his housekeeper, *Elizabeth Tutton*, his sole executrix

and residuary legatee; but in case she died before him, (which was the fact) "he appointed the master of *Christ's College* for the time being his executor; and the said master and fellows of *Christ's College*, who should happen to be master and fellows at the time of his death, his joint residuary legatees."

Reg. Lib. A. 1757. fol. 73.

It will be observed, that the payment of the rents and profits directed, by way of substitution, in the event of the devise for the benefit of the *Tancred* students and pensioners being void by the statute of charitable uses, is to the thirteen fellows of *Christ's College*, and the fellows of *Gonville* and *Caius College*, and the scholars of both colleges generally, and is not confined to such as answered that description at the time of the testator's death. That qualification is

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finer to the individuals who answered the description at the time when the testator died; and as they or their representatives are not before the Court, there is a fatal defect of parties. In the *Attorney-General v. Tancred*, the subject of the gift was a freehold estate devised in fee, from the annual rents and profits of which a perpetual income would naturally arise; and in the words of the devise itself, the college was correctly designated by its corporate name. It appears from the Defendant's answer, which has not been replied to, that *Humphrey Sibthorp* signified his intention of bringing up his youngest son, *Richard*, in the mercantile line, although that intention was afterwards abandoned. How then can it be said with certainty, that he did not acquire such an interest as entitled him to claim the 500*l.* legacy? The three legacies of 400*l.* each, were void for remoteness; for they are given to any son of *Humphrey Sibthorp*, or of *Montague Cholmeley*, at his age of twenty-three, although *non constat* that such son would be in *esse* at the death of the testator; *Jee v. Audley* (a), *Proctor v. Bishop of Bath and Wells* (b), *Leake v. Robinson* (c). The Plaintiffs claim as legatees only by way of substitution, on the ground of the prior legatees having forfeited their interest by allowing the two years to elapse without any nomination being made. But in order to vest a title in the Plaintiffs, it was necessary that something should be done previously; for the condition is precedent, and being one of forfeiture must be strictly performed; *Basket's case* (d). Notice was to be given by the trustees to the parents, and it was only upon such notice, and a refusal by

(a) 1 *Cox*, 324.

(b) 2 *H. Blacks.* 358.


(c) 2 *Mer.* 363.

(d) 2 *Mod.* 200.

is annexed to the master and fellows of *Christ's College*, only in their character of residuary legatees. The statement of the

case in 1 *Eden*, 10. (as well as the marginal note) is therefore incorrect.

by the latter, that the right of the college was to accrue. Now it is not stated or pretended that such a notice was ever given.

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Mr. *Wakefield*, for the Plaintiffs.

The original decree was pronounced in 1818, and no defect of parties was then suggested. The Master made his report, which was regularly confirmed, and when the cause was heard on further directions, on that second hearing, no such objection was started, the Court and all parties proceeding on the assumption, that if the legacy were good, it could only be supported as a gift in perpetuity to a charity. Lord *Eldon's* impression was the same, when he directed the cause to stand over for the purpose of amending the record; and it is too late now to set up the objection.

On the construction of the will, it is clear that a legacy is here given to certain individuals upon a certain specified event; and those individuals are sufficiently described to leave no rational doubt, either as to the persons who are to take, or the manner of their taking. The gift is to a class, the individuals composing which were continually fluctuating, and might vary indefinitely before the will could come into operation; a circumstance inconsistent with the notion that a special bounty was intended to any particular members of the college. This case is ruled by the *Attorney-General v. Tancred*, in which, for the purposes of Lord *Northington's* judgment, the insertion or omission of the words "living at the testator's death" is quite immaterial. Upon the authority of that case, the gift to the fellows and demies of *Magdalen College* must be construed as a charitable bequest to the college, which that body will of course apply as they in their discretion may think

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best, for the general benefit of the society. It is not incumbent on them to share the legacy in minute fractions among all the persons actually composing the corporation; but if it were, the gift would still be supported as a bequest to the college in trust for the benefit of the particular members, upon the principles laid down by Lord *Northington* in the *Attorney-General v. Tancred*, and approved by Sir *W. Grant* in the *Attorney-General v. Munby (a)*; and the smallness of the legacy, in point of value, would form no argument against its validity. The bequest in virtue of which oysters are supplied to certain messes in *Lincoln's Inn Hall* on the first day of term is an instance of a charitable gift more insignificant in amount, and much less rational in its nature. The contingency was not too remote, for it must have been determined at the end of two years after the testator's death. The language of the clause as to notice is not very precise, but in substance the condition has been complied with. Both *Sibthorp* and *Cholmeley* were well aware of the provisions of the will, and the former must be presumed to have had formal notice, since he at first signified his intention of bringing up a son to trade. Eventually, neither of them thought fit to gratify the wishes of the testator in that point, and, as a consequence of their neglect, the limitation over, which imports a clear gift to the fellows and demies of *Magdalen College*, came into immediate operation, and amounted to a charitable legacy to them, for the benefit of the society generally. If formal notice were required to be given by the trustees, their laches would not be allowed in equity to prejudice or defeat the rights of third parties.

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(a) 1 *Mer.* 327.

The LORD CHANCELLOR.

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The principal question in this cause, was whether a bequest in these terms, — “to the fellows and demies of *Magdalen College*,” — constituted such a description as would enable them to take in their corporate capacity, or as individuals designated by the testator to be the special objects of his bounty. The case is one of considerable difficulty, created chiefly by the very singular language of the will. The will is that of a person far advanced in years; and it would perhaps be impossible to find a more senseless and absurd collection of words than occurs in that part of it which relates to the legacy in question. These circumstances relieve my mind from much of the embarrassment I should otherwise have felt, in arriving at a satisfactory conclusion; for they are quite sufficient to bring into operation the well established principle upon which the court has always decided in favour of the heir, whenever the testator’s intentions towards devisees or legatees cannot be distinctly ascertained.

In support of the validity of the bequest as a gift in perpetuity to a charity, the authority of the *Attorney-General v. Tancred* was strongly relied upon by the Plaintiffs; but on reference to the registrar’s book, that case will be found to be incorrectly stated in the report of Lord *Northington’s* decisions, and the error has been since copied into *Ambler*, where, after the devise to the fellows of *Christ’s*, and of *Gonville* and *Caius*, and the scholars of both colleges, the late editor has inserted, borrowing them from Lord *Henley’s* report, the words “living at his (the testator’s) death,” for which there is no warrant in the will, as it appears upon the pleadings. The mistake has been caused by confounding that devise with another passage occurring in a subsequent part

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of the same will, whereby the master and fellows of *Christ's College*, at the time of the testator's death, are nominated his joint residuary legatees. The case of the *Attorney-General v. Tancred*, therefore, will remain untouched by any judgment I may pronounce upon the instrument now before me.

Looking at the whole of the circumstances of this case, I think it would be straining too much in support of the bequest, if I were to hold that the legatees were intended to take these sums as a perpetual gift to them and their successors. On calculating the probable value of the legacy, I find that, although, if the testator intended it as a memorial of kindness to his old college friends and acquaintance, it might, perhaps, amount to 15*l.* or 20*l.* to each of them, yet, if it was to be divided among the body of the college, as a charitable gift, it could not be worth more in annual value than from 15*s.* to 18*s.* apiece. If it be possible, therefore, to assign any rational intention to a bequest so extraordinary and irrational, the probability is, that the testator meant the legacy to vest not in the college collectively, but in those individual members who should be alive at the time of his decease. This, however, is little more than conjecture, and I have already observed, that, upon the principles of former decisions, it is impossible to support such a bequest. The judgment of the Court below must be reversed.

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MONYPENNY v. BRISTOW.

JAMES MONYPENNY by will, bearing date the 11th of *February* 1804, and duly attested, after confirming his marriage settlement, whereby certain lands were settled on his wife for her jointure, gave and devised to his said wife, as a further provision, certain lands in the parishes of *C.* and *T.* for her life: he then gave and devised certain other lands in the parishes of *G.* and *M.* to his brother *Thomas Monypenny* for life, with remainder to the second son of the said *Thomas* for life, and to his first and every other son in tail; and he devised certain other lands in *C.* unto his brother *Robert Monypenny* for life, with remainder to the son of the said *Robert* for life, and to his first and every other son in tail; and he gave and devised his house, called *Maytham Hall*, and the rest, residue, and remainder of his real estate whatsoever, in possession, reversion, remainder, and expectancy, except as before devised, unto his brothers *Phillips Monypenny*, *Robert Monypenny*,

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Nov. 16. 18.

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The rule of law, that the title to land cannot be tried in an action for money had and received, does not apply to cases where only the past-gone rents of lands are in question.

Where a codicil in its dispositive part is applicable solely and expressly to the property previously devised by the will, it has not

the effect of republishing that will, so as to carry after purchased property, notwithstanding a more general intent indicated in its recital.

The widow of a testator, with the acquiescence of his heir, was let into possession of certain freehold houses, under an erroneous supposition that they passed by the will along with other property, in which a life interest was devised to her; and before the error was discovered or her right disputed, she died. On a bill filed by the heir against her personal representative, praying the delivery of title deeds and an account, it was held,

That the suit was maintainable for the rents received during her continuance in possession;

That as the defence of the statute of limitations was not raised upon the pleadings, the account should be taken from the time when the Plaintiff's title first accrued; and,

That the Plaintiff was not at liberty to set off the amount of such rents against payments made by the widow in her character of executrix, those payments being, by virtue of a special trust, a primary charge upon the estates, of which, subject to the widow's life interest, the Plaintiff was devisee.

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penny, and *Thomas Monypenny*, and their heirs, upon trust, within six months after his decease, to sell or dispose of so much of his said last devised estates as should be sufficient to pay off and discharge all his just debts and legacies, and also his funeral and testamentary expences, it being his express will and desire that his personal estate should be wholly freed and discharged from all payments and demands whatsoever; and subject thereto, he devised the same to his brother, *Phillips Monypenny*, for life, with remainder to his first and every other son successively, in tail male, with divers remainders over; and he gave, devised, and bequeathed to his said brother *Phillips Monypenny*, his heirs, executors, and administrators, all his real, copyhold, and leasehold estates in or near the town of *Birmingham*, and in the parish of *Hackney*.

The testator, by a codicil bearing date the 25th *July* 1818, which was duly executed and attested, and which he declared to be a codicil to his will, and desired might be taken as a part thereof, after reciting the devise which by his will he had made of the lands in the parishes of *C.* and *T.* to his wife for life, continued as follows: "And whereas I am desirous of making a more liberal provision for my said wife, and that she may enjoy the whole of my lands, tenements, and real estates for the term of her natural life, and take my personal estate absolutely, now, therefore, I do hereby confirm the said hereinbefore recited devise; and I do further give and devise unto my said wife, during her life, all those my lands, &c., in the parishes of *G.* and *M.*, and also all those my lands, &c., in *C.* aforesaid" (which the testator recited he had by his said will devised to his brothers *Thomas* and *Robert*, and their children respectively); "and I direct that the estate for life, hereby devised to my said wife in my said lands,
and

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and situated in the several parishes of G., M., and C., shall vest in possession immediately after my decease, and take precedence of the several estates thereof respectively devised or limited by my said will." The testator then, after the decease of his wife, gave and devised the said lands, &c., so thereby devised to her for life, to such and the same persons, for such and the same estates, and upon such and the same trusts respectively, as would have taken the same by virtue of his said will; and after reciting, that by his said will he had given and devised his house called *Maytham Hall*, and also all the rest, residue, and remainder of his real estate whatsoever, in possession, reversion, remainder, or expectancy, except as before devised, unto his three brothers and their heirs upon trusts therein expressed, he revoked the said last-recited devise; and thereby gave and devised his house called *Maytham Hall*, and all other his real estate whatsoever which he had by his said will devised to his said three brothers upon the trusts therein mentioned, unto *Robert Monypenny, William Forbes, C. Willis* the elder, and *C. Willis* the younger (whom he also named his executors), and their heirs, upon trust, after his decease, to sell and dispose of such parts thereof as might be necessary for raising and paying his debts, legacies, funeral and testamentary expenses, and the expenses of their executorship, it being his express will and desire that his said real estate should alone stand charged therewith, and that his personal estate should be freed and discharged therefrom; and subject thereto, upon trust for his said wife during her life, and after her decease upon such and the same trusts as were declared of the real estate by his said will devised to the said *Phillips Monypenny, Thomas Monypenny*, and *Robert Monypenny*, and their heirs by his said will, immediately subsequent to the power of sale in that behalf contained.

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The will then proceeded thus: "And whereas by my said will I have given, devised, and bequeathed to my said brother *Phillips Monypenny*, his heirs, executors, and administrators, all and every my real, copyhold, and leasehold estates in or near the town of *Birmingham*, and in the parish of *Hackney*; now I do hereby revoke the same devise and bequest, and do hereby give, devise, and bequeath all and every my said estate, so given to the said *Phillips Monypenny* as hereinbefore lastly recited, unto my said wife for the term of her natural life; and immediately after the decease of my said wife, I give and devise the same unto my brother *Phillips Monypenny*, his heirs, executors, and administrators, absolutely for ever."

In a subsequent part of the same codicil the personal estate was given to Mrs. *Monypenny*, clear of debts and legacies; and it was provided that whatever debts and legacies she paid, should be repaid to her with interest, by sale of a sufficient portion of the real estate charged therewith. By an unattested codicil of later date, she was nominated an executrix of the will, to act in conjunction with the executors already appointed.

Subsequently to the execution of the will, but prior to the date of the first codicil, the testator acquired two freehold houses in *Birmingham*; and on the 3d of June 1822 he died, leaving the said *Phillips Monypenny*, his heir at law, and his widow, *Mary Monypenny*, surviving. The trustees and executors, with the exception of *Robert Monypenny*, executed a disclaimer of the trusts, and also renounced probate of the will. The will and codicils were proved by the widow alone; and upon the notion, which all parties appear to have entertained, that under the devise in the first codicil Mrs. *Monypenny* took a life-interest in the whole of the testator's real property, she obtained the custody

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custody of the title deeds, and was let into possession of all the real estates, including those charged with the payment of the debts and legacies, and the two after-purchased tenements in *Birmingham*, and she continued, with the full knowledge of the heir at law, in the undisturbed possession and enjoyment of those estates as long as she lived. On the 5th of *December* 1826 Mrs. *Monypenny* died, having paid debts and legacies to a large amount, which had not been repaid to her at her death.

The amended bill was filed on the 4th of *December* 1829 by *Phillips Monypenny*, the heir at law, and *Robert Monypenny*, the sole acting trustee, and also the executor of the testator, against her personal representative; and it prayed, among other things, that the title deeds of the real estates subjected to the charge might be delivered up, — that the testator might be declared to have died intestate with respect to the two after-purchased houses in *Birmingham*, — that an account might be taken of the rents and profits thereof during the time Mrs. *Monypenny* had continued in possession, and that the Plaintiff, *Phillips Monypenny*, might be at liberty to set off against what should be found due from the Defendant on that account certain sums of money, which the bill stated to be due from the Plaintiff to the estate of Mrs. *Monypenny*, in respect of her disbursements as the executrix of her husband, the Plaintiff submitting, that if upon the result of the account a balance should be found due to the Defendant, a sufficient sum for the payment thereof should be raised by sale or mortgage of a portion of the real estates charged. The answer of the Defendant did not set up the statute of limitations as a bar to any part of the demand.

Mr. *Pemberton* and Mr. *Barber*, for the Plaintiff.

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Mr. Tinney and Mr. Goodeve, for the Defendant.

The first point argued was, whether under the words of the will and codicil Mrs. *Monypenny* was entitled to the rents of the houses at *Birmingham* during her life.

The MASTER of the ROLLS decided that the houses at *Birmingham* did not pass to Mrs. *Monypenny*.

It was then argued for the Defendant that, as Mrs. *Monypenny* had been let into possession, and had continued during her whole life in the peaceable receipt of the rents of the houses in question, under a mistake into which all parties innocently fell, and as those rents had been paid to her with the assent and approbation of the Plaintiff, the latter was not now entitled to be relieved against the consequences of his own error, more especially in a case where he had every means of informing himself of his rights, and the error was purely one of law; *Bilbie v. Lumley* (a), *Brisbane v. Dacres* (b), *Skyring v. Greenwood* (c), *Andrew v. Hancock* (d), *Bramston v. Robins.* (e) It was farther contended, that these rents being wrongfully received by Mrs. *Monypenny*, could have been recovered in her lifetime only by an action of trespass, and that this action, being founded in *tort*, died with her, so that the rents were no longer recoverable by the Plaintiff. And farther it was said, that although in some cases the action of trespass might be waived, and the action for money had and received adopted, that could not be the case where the title of the land came into question, as it did here, inasmuch as the Plaintiff by his bill submitted that point to the judgment

(a) 2 *East*, 469.

(b) 5 *Taunt.* 144.

(c) 4 *B. & C.* 281.

(d) 1 *Brod. & Bingh.* 37.

(e) 4 *Bingh.* 11.

judgment of the Court. In support of this proposition, the cases of *Cunningham v. Laurents* (a), *Newton v. Graham* (b), and *Marshall v. Hopkins* (c), were cited. The Defendant also insisted that, if the Plaintiff was entitled in this suit to claim any part of the rents of the *Birmingham* houses received by Mrs. *Monypenny*, he could claim only such rents as were received by Mrs. *Monypenny* within six years from the filing of the amended bill which first raised the claim to them; for unless the Plaintiff could by action at law have recovered them from the Defendant, he could not recover them in equity.

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For the Plaintiff reliance was placed on *Hambly v. Trott* (d) and *Pulteney v. Warren*. (e)

The MASTER of the ROLLS.

The general principle which governs cases of this kind is stated in *Hambly v. Trott*. (g) In that case Lord *Mansfield*, after citing a case from Sir *Thomas Raymond*, in which an executor was held not to be chargeable in *tort* for a wrong done by his testator, expresses himself in the following manner:—“ Sir *Thomas Raymond* adds, *vide Saville*, 40., a difference taken. That was the case of Sir *Henry Sherrington*, who had cut down trees upon the Queen’s land, and converted them to his own use in his lifetime. Upon an information against his widow, after his decease, *Manwood* Justice said, ‘ In every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies his executor shall be chargeable; but where the action is for damages only in satisfaction of

(a) 1 *Bac. Abr.* 260. *Gwill.* ed.
 (b) 10 *B. & A.* 234.
 (c) 15 *East*, 309.

(d) *Cowp.* 371.
 (e) 6 *Ves.* 72.
 (g) *Cowp.* 371.

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of the injury done, there his executor shall not be liable.' These are the words Sir *Thomas Raymond* refers to. Here, therefore, is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c. there the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where besides the crime property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall." Therefore where the trespasser commits an injury, without benefit to himself, and dies, then the action dies with the person. But where the injury is attended with a profit to the trespasser, there the party may waive the *tort*, and bring an action of *assumpsit* against the executor for the value of the property taken by the trespasser.

It is truly said, that the title to land cannot be tried in an action for money had and received; but this is to be understood of cases where the present right to land is in question, and not cases where the question applies only to past-gone rents. If the Plaintiff had proceeded against Mrs. *Monypenny* in her lifetime, and during her possession of the land, he could not have sustained the action for money had and received, but must have proceeded by ejectment, for there the title to the land would have been in question. This distinction governed the late case of *Pearce v. Day* (a) before Lord *Tenterden*, where after the death of a bankrupt, who had been

tenant

(a) Tried at the *London* sittings after *Hilary* term 1826.

tenant for life of certain property, his assignees recovered, in an action for money had and received, the past-gone rents of his life-estate from a person who had received them under colour of a fraudulent mortgage deed. An action for money had and received may be brought to recover the profits of an office, although the Defendants set up a title to them.

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I am of opinion, however, that the Plaintiff cannot, upon the principle of set-off, claim to be allowed the amount of the rents thus received by Mrs. *Monypenny* against the demand of the Defendant for the debts and legacies paid by that lady, because the sums which she has so paid do not form a personal demand against the Plaintiff.

If an action at law had been brought by the Plaintiff *Monypenny* against *Bristow* to recover these rents, and *Bristow* had not at law pleaded the statute of limitations, *Monypenny* would have recovered the full amount of the rents received beyond the six years: and as Mr. *Bristow* has not in this suit in equity set up the statute, the Plaintiff is entitled here to the full amount of the rents received by Mrs. *Monypenny*.

The Defendant appealed from so much of his Honor's decree as declared that the two houses in question did not pass to the widow by the first codicil, and that her representative was bound to account for the rents and profits thereof received by her in her lifetime.

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 Nov. 16. 18.

Mr. *Tinney* and Mr. *Goodeve*, for the Appellant.

The two houses at *Birmingham* passed to Mrs. *Monypenny* by virtue of the codicil of the 25th of *July* 1818; the effect of which was to make the will speak as of
 that

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that date, in other words, to republish it on that day. The principle is, that a codicil amounts to a general republication, unless it contains something which, either by express words or plain implication, shews the testator's intention to restrict its operation to some specific purpose. *Pigott v. Waller.* (a) The doctrine of the Courts is to favour republication. (b) It is not necessary that the codicil should contain any reference to the real estate; *Barnes v. Crowe.* (c) Nor will a devise by a codicil of part of a testator's after-purchased lands prevent other lands so purchased from passing under a general devise in the will. *Goodtitle v. Meredith* (d), *Coppin v. Fernyhough* (e), *Hulme v. Heygate.* (g) Sir W. Grant held, in *Rowley v. Eyton* (h), that a codicil, by which certain lands were specifically devised, had the effect of republishing the will, so as to subject them to a general charge of debts contained in the will. There is nothing in this codicil which, either in terms or by implication, indicates a different intention on the part of the testator. On the contrary it was manifestly his purpose, and it was so understood and acquiesced in by all parties, that his widow should enjoy for her life the rents and profits of all his real estates. The recital in the commencement of the codicil indicates this purpose most unequivocally: if it stood alone, it would amount to a devise of all his property to her; and the language of the residuary clause, wherein, subject to a trust for debts and legacies, and subject to his widow's life-interest, he devises *Maytham Hall*, and all the rest of his real estate whatsoever, to the Plaintiff, in strict settlement, must be construed with reference to the recital, and cannot, without defeating the intent, be confined to those residuary estates exclusively, which
 the

(a) 7 Ves. 98.

(b) 1 Vern. 530.

(c) 1 Ves. jun. 486.


(d) 2 M. & S. 5.

(e) 2 Bro. C. C. 291.

(g) 1 Mer. 285.

(h) 2 Mer. 128.

the will had devised to his three brothers upon trust. The case of *Bowes v. Bowes* (a), on which the Plaintiff will rely, turned upon the use of the word "said," which was held to confine the operation of the codicil, there being no indication of an intention to republish the will, to be collected from any other part of it. Yet even there Lord *Thurlow*, on an appeal to the House of Lords, considered the codicil to amount to a general republication. Viewing this as a question, not of republication, but of construction, the dispositive parts of the codicil, and particularly the residuary clause, coupled with the strong and unequivocal language of the preamble, are sufficient to pass the after-purchased property with the rest; *Bibin v. Walker*. (b)

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Assuming the decision to be against the Appellant upon the first point, it is too late to ask for an account of the rents of these houses after the widow's death. The claim was only set up by the amended bill in the end of the year 1829. The rule at law is, that where a person is in possession, you must first bring ejectment against him, and then resort to the action for mesne profits. If the Defendant die before recovery in the ejectment, the remedy is gone, for no action lies for mesne profits while the legal title is in dispute; *Newton v. Graham*. (c) *Hambly v. Trott* (d), and *Boyter v. Dodsworth* (e), have no application. Where the demand, as in the present case, is of a purely legal nature, courts of equity follow the rule of law and refuse the account. In *Barnewall v. Barnewall* (g), where after a recovery in ejectment the defendant died, a bill filed against his executor for an account of rents and profits was dismissed;

(a) 7 *T. R.* 482. *S. C.* 2 *Bos.*
 & *P.* 500. in the House of Lords
 on appeal.
 (b) *Amb.* 661.

(c) 10 *B. & C.* 254.
 (d) *Cowp.* 571.
 (e) 6 *T. R.* 681.
 (g) 3 *Ridg. P. C.* 24.

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missed; and the language of Lord *Eldon* in *Pulteney v. Warren* (a), recognises the same doctrine. It is clear that, if *Mrs. Monypenny* were now alive, no action for money had and received, or for use and occupation, could be maintained against her; as the title to the land is disputed, and could not be tried by those forms of action; and her executor stands precisely in her place. The Court has no original jurisdiction to entertain a suit for mesne profits, and unless there be equitable circumstances to call its jurisdiction into operation, the parties must be left to their legal remedies; for when equity gives the account, it proceeds on the analogy of the rule at law. *Tilley v. Bridge* (b), *Dormer v. Fortescue* (c), *Norton v. Frecker* (d), *Hutton v. Simpson*. (e)

There are no equitable circumstances to justify the Court in interfering, even supposing, contrary to the fact, that a judgment in ejectment had been recovered in the lifetime of the widow. *Duke of Bolton v. Deane*. (g) The Plaintiff has been himself guilty of great laches in not filing his bill till long after the widow's death; and there is no pretence of fraud: all parties acted innocently. The rents were paid to the widow under a common error, against which, it being an error of law, there can be no relief. *Bramston v. Robins*. (h) Neither is there any mutuality of accounts, the judgment of his Honor, from which the Plaintiffs have not appealed, having expressly decided otherwise. The mere fact that the remedy is gone at law will not entitle parties to come into this Court for an account. *Lansdowne v. Lansdowne*. (i) In *Curtis v. Curtis*

(a) 6 *Ves.* 72.

(b) 2 *Vern.* 519. *Pr. Ch.* 252.

(c) 3 *Atk.* 130.

(d) 1 *Atk.* 524.


(e) 2 *Vern.* 724.

(g) *Prec. Ch.* 516.

(h) 4 *Bingh.* 11.

(i) 1 *Mad.* 116. 1 *J. & W.* 522.

Curtis (a) the widow had filed her bill for dower and an account, before the heir died, so that her claim was properly before the Court; and in *Pulteney v. Warren* (b), the right had been established by a verdict in the lifetime of the party.

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But, admitting the jurisdiction to exist, still the decree cannot be supported; for where a party who has committed no fraud has enjoyed undisturbed possession under a mistake, or where the plaintiff has been guilty of laches, the account is not to be carried back farther than the filing of the bill; *Pulteney v. Warren* (b), *Drummond v. Duke of St. Alban's* (c), *Pettiward v. Prescott* (d), *Edwards v. Morgan* (e), *Pickett v. Loggon* (g); or, at all events, it ought to be confined to the six years immediately preceding; *Reade v. Reade* (h), *Harmood v. Oglander* (i), *Stackhouse v. Barnston*. (k)

Sir *E. Sugden* and Mr. *Barber*, in support of the decree.

The first point is decided by *Bowes v. Bowes* (l), which is on all fours with the present case, and has always been followed and approved. *Parker v. Biscoe*. (m) *Bowes v. Bowes*, indeed, was much stronger in favour of republication, for there the testator's object was a mere substitution of trustees, and it might well have been supposed that the trusts were meant to extend to all the property he possessed, whereas the sole purpose of this testator's codicil was to subject all the previous devises to a life estate to his wife, in whose favour the interests of the other devisees were to be postponed; and the language

(a) 2 Bro. C. C. 620.

(b) 6 Ves. 72.

(c) 5 Ves. 433.

(d) 7 Ves. 541.

(e) M'Clcl. 541.

(g) 14 Ves. 215.

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(h) 5 Ves. 744.

(i) 6 Ves. 199.

(k) 10 Ves. 453.

(l) 7 T. R. 482. 2 B. & P. 500.

(m) 3 Moore, 24.

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language used in the codicil is studiously and correctly framed to effect that single object. The idea of passing subsequently-acquired property, the recollection that he possessed any, never once occurred to his mind. The general words of the preamble must be construed with reference to the dispositive clauses which follow, and these are cautiously and expressly confined to the estates already given by the will.

There is more novelty in the second point, but the claim is founded in substantial justice, which the Court will not permit to be defeated by technical objections. It has never been determined that a bill will not lie for the recovery of rents and profits, where the title is either not disputed, or has been established by a judgment at law; or where circumstances have precluded the possibility of trying the title by ejectment. The cases referred to of *Dormer v. Fortescue*, *Curtis v. Curtis*, and *Pulteney v. Warren*, as far as they go, shew directly the reverse. All that Lord *Hardwicke* meant to say in *Norton v. Frecker*, and *Dormer v. Fortescue*, was, that he would not, in aid of a mere ejectment bill, where infants were not concerned, and there was neither fraud nor trust to create an equity, make this Court ancillary to the ejectment by decreeing an account, instead of leaving the plaintiff to recover the mesne profits by action; and if *Barnewall v. Barnewall* decided any thing farther, its authority is very questionable. It is not the mere loss of the legal remedy by the accident of a wrongdoer's death, which of itself can entitle a party to come here; but in *Lansdowne v. Lansdowne* the account was given against the representative of the tenant for life, except as to the permissive waste. Independently of the general question, and without contending that a decree for an account of mesne profits may be always had in equity as a matter of course, it is enough


enough for the Plaintiffs that the circumstances here are so peculiar as of necessity to ground the jurisdiction. The bill is not filed merely for an account; it prays a delivery of the title-deeds; and the account is incidental to that relief; for the Defendant is entitled to retain the deeds till the sums paid by his testatrix, which sums the will has charged on the devised estates, have been repaid.

Dormer v. Fortescue. (a) The nature of those counter-claims, too, creates a mutual accountability which especially calls for equitable interposition. The widow having got into possession, with the acquiescence of the heir, under a common mistake, was not a trespasser or wrongdoer, and the heir may therefore elect to treat her as his tenant or bailiff, and come into equity for an account of the rents as monies received to his use. Supposing those equitable circumstances had been wanting which here give the jurisdiction, the Plaintiff might still have had a remedy at law by waiving the tort and proceeding by an action for use and occupation, or for money had and received; for *Birch v. Wright* (b) only decided, what is confirmed by *Pulteney v. Warren*, that after bringing ejectment which is founded in tort, a party cannot recover the rents and profits by an action for use and occupation: but in *Pearce v. Day*, before Lord Tenterden, the assignees of a bankrupt who had made a fraudulent conveyance of his life-interest in certain property, and died before ejectment could be brought, recovered the value of the rents and profits from the person in possession under the conveyance; a direct authority to prove that a party may, if he pleases, waive the tort and proceed upon the implied contract.

All the authorities shew that if the account is to be given, it ought to be carried back to the time when the title

(a) 3 Atk. 124.

(b) 1 T. R. 378.

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title originally accrued, unless indeed, which he has not attempted in the present instance, the defendant thinks fit to set up the statute of limitations; and that can only be done with effect by formally pleading it to the suit, or insisting upon it by way of defence in the answer.

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 Jan. 25.

The LORD CHANCELLOR, after stating the question, and reading the material part of the codicil, continued as follows: —

That a codicil makes the will speak as of its own date, must be admitted to be the general rule; but it may, nevertheless, be framed in such a manner as to operate as a partial republication only, or to work no republication at all. If, for example, I leave by will all my farms at *Dale* to *A.*, and having afterwards acquired another farm at *Dale*, I say in a subsequent codicil, “I hereby give to *B.* the identical farms which my will has given to *A.*,” it would obviously be doing violence to the language to construe those words as carrying the newly-acquired farm. This, in substance, is the case of *Bowes v. Bowes* (*a*), and in substance also the case before the Court, although I take *Bowes v. Bowes* to be the stronger of the two in favour of republication. The testator there had by his will devised all his freeholds and copyholds to six trustees; by his codicil reciting the trust and revoking it so far as it related to two of the six trustees, he devised to the remaining four his *said* lands, upon the same trusts on which the will had given them to the six; and Lord *Kenyon* held it to be too clear for argument that the will was not republished by that codicil; an opinion in which *Grose* and *Lawrence*, Justices, fully concurred. The case which goes farthest in favour of republication,

(*a*) 7 T. R. 482. 2 Bos. & P. 500.

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republication, and farthest from the principle of *Bowes v. Bowes*, is *Pigott v. Waller* (a), where Sir William Grant went largely into the consideration of the subject, and reluctantly followed the doctrine of the more modern decisions. On a subsequent day he said he had omitted to mention *Bowes v. Bowes*, and remarked that the Court in that case proceeded upon the intent appearing on the face of the codicil. The case of *Goodtitle v. Meredith* (b), where the general principle is laid down broadly, also recognises the authority of *Bowes v. Bowes*. In *Hulme v. Heygate* (c) the Master of the Rolls, while he expresses his entire concurrence with the judgment in *Bowes v. Bowes*, holds it to be “a point now clearly established as a general rule that a codicil duly attested does amount to a republication;” and he afterwards observes (d), “I must absolutely deny the inference, that, because the testator has thought fit to specify some of the after-purchased estates in this codicil, I am therefore to exclude all the others. To the question, Why does he expressly mention some except for the purpose of excluding the others, I answer, that the question would apply equally to the will itself, and tend to exclude all the estates whatever, except that which is there specified.”

It is quite another thing, however, to maintain that a codicil shall in all cases necessarily amount to a republication; for here it is as if the maker of the codicil had said, “I am now dealing with the property I have given, and with no other.” And this view is rather confirmed than shaken by reverting to the preamble on which the Defendant’s counsel laid so much stress. My observation with respect to that is, that if, upon the subsequent part, the testator’s intention were doubtful, that

(a) 7 Ves. 98.

(b) 2 M. & S. 5.

(c) 1 Mer. 290.

(d) 1 Mer. 294.

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that preamble might lead us to a construction of the intention; for ever since the case of *Acherley v. Vernon* (a) the principle has been to presume in favour of republication, making that the rule, and the restriction the exception; and thus to throw the burthen of shewing a limited intent upon the party who denies the operation of the codicil. I cannot, therefore, agree in thinking that this codicil was no republication, unless the testator thereby indicated an intention to republish. But, inasmuch as the operative words in it appear to me to be sufficiently restrictive, the preamble is not, I apprehend, to be taken into consideration. The decision in *Bowes v. Bowes*, which indeed is a weaker case, seems entirely to dispose of the present question. In *Bowes v. Bowes*, as in the present instance, the testator revokes the devise; but he does here what I take to be much stronger, for the codicil purports to devise "my said estate, so given to the said *Phillips Monypenny* as hereinbefore lastly recited." And what were the estates which were so given, and what was the recital? Clearly, to use the language of Mr. Justice *Grose*, the testator could not mean estates afterwards acquired, for they were not then his to give.

Thus far upon the point of republication, which after all is but a secondary question, the main contention being whether the executor of Mrs. *Monypenny* shall account for the rents of those after-acquired houses which during her life she held without a title, possessing them, not adversely, nor as the bailiff of the owner, and accountable to him (for the owner was ignorant of his rights), nor yet under any contract, hardly even by sufferance, but, as it is alleged, under a mistake in law. Upon this point, I confess, I have felt a great deal of difficulty; but, after the best consideration

I have

(a) 3 Bro. P. C. 55. Toml. ed.

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I have been able to give, and having regard to the peculiar circumstances of the case, I am, on the whole, inclined to agree with His Honor upon this part also of his judgment, and to decide that the personal representative of Mrs. *Monypenny* is bound to account for the rents. The leaning ought clearly to be towards making him an accounting party. The niceties at law upon this subject are illustrated in the well known case of *Hambly v. Trott* (a), where Lord *Mansfield* lays down the doctrine that tort or trespass will not lie against an executor; but that where, besides the crime, property is acquired which benefits the testator, an action for the value shall survive, and that, so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore shall be charged. The judgment, however, in *Hambly v. Trott* does not assist us much, for the question in that case was, not whether the remedy lies against the executor, but whether it lies against the party in his lifetime? Here, on the other hand, there was no ejectment, and consequently no action for mesne profits brought in Mrs. *Monypenny*'s lifetime, as she died before the mistake was discovered.

Upon the whole, although I do not see my way clearly amidst the apparent conflict of *dicta* and authorities upon this point, I can find no satisfactory reason to justify me in reversing the judgment of the Court below. I shall affirm the decree without costs, and direct the deposit to be returned. (b)

.. (a) *Cowp.* 571.

(b) Upon the effect of a co-
dici in republishing the will, in
addition to the cases cited in the
argument, see *Guest v. Willasey*,
2 *Bingh.* 429. and 3 *Bingh.* 614.,
Williams v. Goodtitle, 10 *B. &*
C. 895. As to the time from

which the account will be di-
rected, and the necessity of in-
sisting upon the statute of li-
mitations by way of defence in
the pleadings, *Hercy v. Ballard*,
4 *Bro. C. C.* 468., *Cory v. Cory*,
post.; but see *Collins v. Ar-*
cher, 1 *Russ. & M.* 284. In

1832.

MONYPENNY
v.
BRISTOW.

Gardiner v. Fell, 1 Jac. & W. 22
no doubt seems to have been
suggested as to the right of the
Court to decree an account of
rents and profits from the time
when the title accrued against

the personal representatives of a
person who had been allowed to
take possession under a mistake
of law, and who died before the
title was disputed.

1831.

Jan. 14, 15.

BARTLEMAN v. MURCHISON.

A testator gives to his mother an annuity for life, and after her decease to his sister, if she be a widow, but not otherwise, but to revert back to his children, after her death. At the death of the testator and of the mother, who survived him, the sister was a married woman: Held, that the sister on afterwards becoming a widow, was not entitled to the annuity.

THE question arose on the construction of the following clause in a will:—"I give and bequeath unto my mother, Mrs. Janet Murchison, the sum of 100*l.* sterling money per annum, payable every six months during her natural life, and after her decease to my sister Mrs. Margaret Bartleman, that is to say, if my sister be a widow, but not otherwise, but to revert back to my child or children after her death, and that a sufficient sum for the above purpose shall be invested by my executors in the British funds." The testator also appointed his children his residuary legatees.

Janet Murchison and *Margaret Bartleman* both survived the testator. At the date of his will and the time of his decease, Mrs. *Bartleman* was a married woman, and she continued under coverture till some time after the death of Mrs. *Murchison*, when her husband having died, she filed her bill claiming the annuity. The executors put in a general demurrer, which the present Vice-Chancellor on argument allowed, and the Plaintiff thereupon appealed.

The *Solicitor General* and Mr. *Temple*, for Mrs. *Bartleman*.

This

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This is a mere question of intention to be collected from the language of the instrument itself, as applicable to the relative situation of the parties. The natural presumption is that the testator wished the annuity to be a provision for his sister (who was plainly an object of his affection), but to take effect only at the time and in the single event of her becoming a widow. The word "be" is here equivalent to become; or the same result will be arrived at by reading the word "if" as if it had been written "when;" a construction frequently adopted where good sense and probability recommend it; *Smart v. Clark.* (a) During the Plaintiff's coverture the burthen of supporting her would of course fall upon her husband: but when he died, her situation would be materially altered; and it is irrational to suppose the testator could have meant to leave her title to his bounty to depend on the collateral accident of her being or not being a widow at the time when the prior life estate determined. According to the clause even as it stands, every letter of the bequest has been strictly fulfilled, and the Plaintiff is therefore entitled to demand the annuity. The bequest is to Mrs. *Bartleman*, *after*, not *at*, the mother's decease; and if she be a widow and not otherwise. The mother is now dead; and Mrs. *Bartleman* is a widow. It is true she was not a widow at the moment when the mother died: but no such term is annexed to the gift by the will; and the Court will not import into it a condition which is not expressed, which is not required by any legal principle, and of which the operation would be to defeat the bequest altogether. There is no peremptory rule of law which prescribes that the vesting of a legacy shall not remain in suspense during any number of existing lives. On the contrary such suspense is extremely common, as in the case of bequests

(a) 3 *Russ.* 365.

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quests to females on their marriage, and no practical inconvenience has been found to result from it. *Godfrey v. Davis* (a), and other cases of that description have no application: for here the legatee was *in esse*, and her enjoyment only was postponed; and it is not necessary that the interest should become vested absolutely at the determination of the particular estate, provided the period of suspension does not exceed the rule against perpetuities. The peculiar wording of the last sentence, when it speaks of the fund reverting back to the testator's children after Mrs. Bartleman's death, fortifies the construction founded on the language of the bequest; for if the legacy were never to vest in her, or never to be suspended, with what propriety could it be directed to revert back to the children upon that event? and as the capital was to be invested, and the children were to take no interest in the fund till after her decease, the principal till then could not be touched, and what was to become of the dividends in the mean while? Had the testator considered them undisposed of, would he not have included them expressly in the residuary clause? On the other hand, the claim of the Defendants cannot be maintained without doing violence to the will, for either the word "after" must be construed to mean "at;" or the description of the legatee must be qualified by the insertion of the word "then" or some other phrase of the like import, and that for the very purpose of excluding her.

Sir E. Sugden and Mr. B. Parry, contra.

There is nothing illegal in the suspense which the Plaintiff's construction would require, but it is contrary to the probable intent, and will not be presumed where the words are fairly capable of a different meaning. In
deciding

(a) 6 Ves. 43.

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v.
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deciding questions of this kind with respect to personal property, the Court always leans to that interpretation which will prevent or most speedily put an end to the contingency. The rule is founded partly on convenience, partly on the analogy of the law as to real estates, and partly on considerations of probability; and it has prevailed in a variety of cases where the argument now set up was attempted without success. *Ellison v. Airey* (a), *Godfrey v. Davis*. (b) Upon the same principle a legacy to the children of *A.*, or to *A.*'s children, after the death of *B.*, or to *A.*'s children generally at twenty-one, will exclude, in the respective cases, all such children as happen to come into *esse* after the death of the testator, or of *B.*, or after the time when the eldest attains twenty-one; these being the first periods respectively when the interest given can by possibility be held to vest. Here, if no prior life estate had been bequeathed, a doubt could not be suggested—the case would range within the first of these classes: the insertion of the life estate to the mother makes it fall precisely within the principle of the second. According to the Defendants' construction not a word requires to be inserted, rejected, or altered. "After" must mean immediately after, that is, at the decease. The obvious purpose was to make a provision for Mrs. *Bartleman* only in case she was a widow at the determination of the mother's life interest, and not at any time when she should become so. The plaintiff's argument would go the length of holding that the annuity was to be enjoyed *durante viduitate*, to vest the moment she became a widow, and to be again divested every time she married; a most extravagant supposition, and directly at variance with the subsequent clause, by which the fund was not to "revert back" to the children till after her decease.

That

(a) 1 *Ves.* sen. 111.

(b) 6 *Ves.* 43.

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v.
MURCHISON.

That phrase creates no real difficulty, for it only refers to the case of the legacy having vested; if that has once happened the fund is not to revert till after the legatee's death. Perhaps the testator may not have contemplated, and therefore not provided for the event that has occurred; perhaps he may have foreseen and not thought proper to provide for it; but either way Mrs. *Bartleman* can have no claim.

The LORD CHANCELLOR.

Although in construing bequests of personal estate, the same technical strictness does not prevail as in devises of real estate, the same rules are to a great extent applicable, not only with a view to avoid a perpetuity, but also to determine with certainty the persons to whom the property is to go. It may therefore become necessary in construction to supply by intendment the words "living at the time of the testator's death" in a gift of personal, as well as of real estate. For example, in a bequest to the children of *A.*, the words are confined to such of *A.*'s children as are living at the testator's death. So where the legacy is given at the determination of a particular estate previously limited;—as where the legacy is to *A.* for life, and after his decease to the children of *B.*, the like rule of construction, imported from the law as to real estates, is allowed to operate, and it restricts the bounty to the children of *B.* who are living at the death of *A.*, that being the time when the interest is to vest in possession. A court of equity will not presume that a party who is not *in esse* is intended to take, unless such an intention be made plain and put beyond dispute by the words of the will; and it is only following out the same principle to hold that a person, to whom a legacy is given in a particular character, and by a particular description, shall not be entitled

to it, unless he be clothed with that character, and answer that description, at the moment when the legacy might vest in possession.

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This then is the first difficulty. Besides, I greatly doubt whether under the residuary clause the testator meant to deal with the property during the intermediate period while Mrs. *Bartleman* was a married woman, especially as he has not left that clause to provide for a case which it would much more naturally have covered, and which was much more obviously in his contemplation—I mean the application of the fund in the event of Mrs. *Bartleman*'s death. The probability is that the particular contingency which has taken place never occurred to his mind. According to the plain sense of the words, the bequest is, after the mother's decease, to the sister, provided she be a widow at the period when the interest is to vest, if at all. In general a testator does not provide for all cases. He may however have said to himself here, "If my sister be a widow at the death of my mother, she shall have the annuity; but her husband will then see whether I have made a provision for her or not, and will act accordingly; and then, when only she takes it, she shall take it for life, for I will not suspend the gift; I provide only for ordinary circumstances." The authority of *Smart v. Clark* is by no means broken in upon by this construction. The five years there specified had clearly reference to the non-claim only, but upon the death of the legatee at any time, the bequest over was to take effect.

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Jan. 27.

BARNSDALE v. LOWE.

The Court will not make an order for the publication of depositions taken in a suit, to perpetuate testimony, whilst the witnesses are alive.

MR. COOPER moved that depositions taken in this cause might be published, notwithstanding that the witness was alive. The circumstances under which he made the application were these:—An intending purchaser having taken it as an objection to the title of an estate, that two of the attesting witnesses to a will under which the estate was held were dead, it was made a condition of his contract that a bill should be filed to perpetuate the testimony of the surviving witness. The bill was filed accordingly, and it now became material to see the effect of the witness's evidence. The principal Defendant, the heir at law, was under age, and therefore incapable of consenting; but it was the wish of all parties that the order for publication should be made. Mr. Cooper referred to the *Practical Register* (a), to *Harris v. Cotterell* (b) and to *Dursley v. Fitzhardinge* (c) as furnishing some authority for contending that, under peculiar circumstances, and in a strong case, the Court would relax the strictness of the general rule.

The LORD CHANCELLOR said that, although he felt very great doubt how far he was at liberty to accede to the application, he should, before he finally disposed of it, direct a search to be made for precedents.

Jan. 31.

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1831.

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It was evident, however, that Lord *Eldon* was not altogether satisfied with what he had done on that occasion, for in two subsequent cases where similar motions were made under circumstances of considerable urgency, his Lordship declined to follow the precedent he had himself created, and would not listen to the application. The Lord Chancellor added that there would be great danger in departing from the strict rule; the authorities were all against any such departure; and as there was nothing in the present case which peculiarly called upon the Court to make an exception in its favour, he felt no difficulty in refusing the motion.

The following are the notes of the cases, to which the Lord Chancellor referred in the preceding judgment: —

Friday, 14th of December 1809.

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BARNSDALE
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be published for the above named Plaintiff, to make use of them before the House of Lords, or before any committee of the said House; his Lordship doth order that the said depositions of The Right Honourable *Frederick Augustus*, late Earl of *Berkeley*, be forthwith published accordingly. But the Plaintiffs' clerk in Court is not to publish the depositions of any of the other witnesses.

Reg. Lib. A. 1809, fo. 58.

14th of *July* 1813.

Coventry v. Coventry.

Mr. *Richards* moved his Lordship that publication might forthwith pass, and that the examiner might be ordered to deliver out copies of the depositions.

The bill had been filed to perpetuate. Sir *Samuel Romilly* read the *Practical Register* as the only authority.

Lord *Eldon* said, depositions ought not to be published, except between the parties in the cause; he had great doubt about the *Berkeley* case, and great fault had been found with that publication. His Lordship observed that very great care should be taken about the practice in this case, and that he would consider it. He added, that the reason why he published the depositions in the *Berkeley* case was to support the dignity of the family.

The order does not appear from the Registrar's minute book to have been drawn up, and it is not entered.

12th of *February* 1817.

1831.

Morison v. Arnold.

BARNSDALE

v.
LOWE.

In this case the testator made two wills, which materially differed from each other: the latest in point of date he signed in his bed-room, and it was witnessed in an adjoining room by three witnesses, but they did not see the testator sign it, neither did he acknowledge it to the witnesses as having been executed by him. As it became necessary to sell the testator's estates, which were of great value, it was requisite that the second will should be proved not to have been legally executed; and for that purpose a bill was filed in this Court to examine the three witnesses, and perpetuate their testimony. After this had been done, and the witnesses had been examined by the examiner, a difficulty arose in procuring publication of the depositions, the witnesses being all alive; and Sir *Samuel Romilly* on the above day moved his Lordship that the depositions might be published, at the same time stating that he could cite no case to his Lordship as an authority for the application. Lord *Eldon* said he would look into authorities, but not finding any, he desired to see the form and allegations of an order where depositions *had been* published. As no precedent could be found where the witnesses were living and the bill had been to perpetuate, the Registrar furnished his Lordship with the order made, upon the death of one of the witnesses, in the case of *Lord Abergavenny v. Powell*, 12th *July* 1816, Reg. Lib. A. 1815, fo. 1261, (which is in the same form as that in the *Berkeley* case). His Lordship told Sir *Samuel Romilly* and the Registrar, he thought he should order the depositions to be published; but he observed afterwards, that as the witnesses had signed a declaration on the back of the will that they did not see the testator sign, and that he had not acknowledged the will to have been

1831.
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executed by him, such an order was in truth unnecessary, and his Lordship therefore refused to make it.

As it was a matter of great importance to have the depositions published, Sir *Samuel Romilly*, on the 11th of *February* 1817, again pressed the publication, and on the 12th of *February* his Lordship again said it was unnecessary, as the second instrument was not a will; and he added that he would order the depositions to be published, if a precedent could be produced to him, but not otherwise.

The same application was afterwards renewed before his Lordship, who said he was perfectly right in what he had done;

And, as no case could be produced as an authority for such an order, the solicitor for the Plaintiff gave up the point, and filed a bill to obtain an issue.

1831.

MONKTON v. ATTORNEY-GENERAL.

Jan. 17, 18. 22.

IN the month of *July* 1785, *Samuel Troutback* died at *Madras* at a very advanced age, leaving behind him a large fortune, which he had acquired in trade during a long residence in the *East Indies*. By his will, dated the 21st of *July* 1780, he gave the bulk of his property to trustees, for the purpose of founding a school for the education of orphan children, in the parish of *St. John, Wapping*, “to be called *Troutback’s Poor Orphan Hospital, or Blue Coat School*;” and the will contained very minute directions with respect to the endowment and regulation of the charity.

Where, in a pedigree case, the object is to connect *A.* with *C.*, after proving that *B.*, a deceased person, was related to *A.*, it is competent to give in evidence declarations by *B.*, in which he claimed relationship with *C.*

The motives which (in part at least) influenced the testator in making this disposition of his property, sufficiently appear from the declarations contained in the will itself. After reciting that he had no relation or kindred alive, to his knowledge or belief, having outlived them all, his son *George* and his late dear beloved wife being the last deceased, the testator bequeathed “five gold star pagodas to every person who shall, within three years after my decease, prove themselves to be lawful sons of any person surnamed *Troutback*, and born a native of *England*,” and he likewise gave “unto *Mr. John Troutbeck*, surgeon, late of the ship *Speke*, in the *English East India Company’s* service, the sum of five gold star pagodas,

A paper in the handwriting of *B.*, found in his repositories at his death, and purporting to give a genealogical account of his family, of which it represents *C.* to have been a member, is admissible for the same purpose, though never made public in *B.’s* lifetime, though erroneous in various par-

ticulars, and professing to be founded chiefly on hearsay.

Nature and amount of the evidence, upon which the Court will direct an issue to investigate a title depending on a question of pedigree.

After a residuary fund had been paid into the exchequer, under a decree establishing the right of the crown, parties setting up a title to the fund were permitted, upon petition in the cause, and with the leave of the crown, to go before the Master for the purpose of making out their claim.


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pagodas, provided he demand the same of my trustees, at Fort *St. George*, in person, within three years after my decease, and not otherways, as a person nearly of the same name with *Troutback*, though I solemnly believe and declare that the said *John Troutbeck* is not any way related to me, or of the same family and kindred with me, and I disclaim all relationship with him or to him." Next came the following recital: — "And whereas it is natural for all men to have a regard for their native place, and where the seeds of their education were first planted and imbibed, and more especially when they have no kindred or relations alive or in being, which is the case with me, who came on shore naked and shipwrecked in *India*, at the same time I lost my only brother, who was drowned." — The testator then proceeded to dispose of his property for the charitable purpose already mentioned. In the course of that disposition he spoke of the public charity school, built and standing near *St. John's Chapel*, in *Wapping*, "being the school where I got my first education, but not boarded at, in the year 1706, 1707, and 1708, during the tutorship of my godfather the late *Samuel Jefferies*, gentleman, the head schoolmaster." And in another passage, after giving a sum for the purchase of an organ in *St. John's Chapel, Wapping*, he directed the following inscription to be cut and gilt in front of it. "The gift of *Samuel Troutback*, merchant, born in this parish, *anno Domini* 1700." In another part of his will he stated that providence had "prospered his honest endeavours in the *East Indies*, during his residence there, now nearly sixty years."

In the year 1792 a suit was instituted for the purpose of administering the trusts of this will, and under the decree the Master was directed to take the usual accounts, and also to inquire who were the testator's heir

heir at law and next of kin. In *July* 1813 the Master reported that no heir at law or next of kin of the testator could be found. The report was, in *July* 1814, followed by a decree, whereby it was declared that the bequests to charitable uses contained in the will were void, and that, as the testator had left no heir at law or next of kin, the residue of his real and personal estate had vested in the crown; and, accordingly, in the month of *April* 1816, a sum of 88,045*l.*, being the produce of the clear residue, after deducting the costs, was paid into his Majesty's exchequer in pursuance of that decree.

1831.

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In *June* 1825, *George Cawthorne, Catherine Robson, and Isabella Ainsley*, who claimed to be entitled to a share of the testator's residuary estate as three of his next of kin, having previously obtained leave from the Treasury, were, on their petition in the original suit, permitted to go before the Master for the purpose of establishing their title in that character. In *June* 1827 the Master made a report against their claim, and the petitioners thereupon excepted, and at the same time applied that an issue might be directed, in order that the question of propinquity, which the claim involved, might be more thoroughly investigated before a jury. The Vice-Chancellor over-ruled the exceptions, and refused the trial at law, on the ground that no sufficient *prima facie* case was shewn for it. The claimants now appealed from his Honor's decision.

On the appeal, the main question came eventually to be, how far the Vice-Chancellor was right in rejecting from his consideration, as evidence of the relationship between the testator and the claimants, certain documents purporting to be a genealogical narrative and pedigree of the *Troutbeck* family. These documents were in the handwriting of *John Troutbeck* (the surgeon

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in the *East India* Company's service, mentioned as a legatee in the will), and were found in his repositories at the time of his death, which took place in the year 1792.

The narrative bore date 1781, and began in these words: —


“ The following account of the family of *Troutbecks*, being the best I can at present collect, I commit it to paper, as a memento, hoping at some opportunity to revise it, and make it more correct and perfect.

“ In the following there appears a deficiency about the second generation, which nothing but the examination of old wills can rectify.”

After referring shortly to the early traditions of the family, the narrative took up the genealogy at a Sir *Robert Troutbeck*, who was admitted vicar of *Newton* in 1593, and it went through the history of his descendants in succession as follows: —

“ Sir *Robert Troutbeck* was married to *Mary Wilkinson*, and on the 11th of *January* 1637 he died, and was buried at *Newton*, leaving issue five sons and two daughters, as appears by his will, — *William*, *George*, *Christopher*, *Lancelot*, and *John*. *William* married, and lived at *Blencow*. *George* was rector of *Bowness* in 1660. He died in 1691, and left issue two daughters, who were married to *Hodgson* of *Easton* and *Lawson* of *Bowness*. Of him 'tis remarked, that he laid down his gown and took his sword during the civil wars, and then resumed his gown again. *Christopher* lived nigh *Wigton* in *Cumberland*; but whether he had any family I never could learn. *Lancelot*, it is said, died young. *John* lived at *Ravenhead*, and, it is said, had two sons that

that went abroad, but where is uncertain. *William* of *Blencow* had five sons — *George*, *John*, *William*, *Ralph*, and *Robert*. *George* lived at *Blencow*. *John* was educated for the church: he was rector of *Willingbro'*, *Northamptonshire*, and had three sons, — *Edward*, *William*, and *Thomas*. *William* lived in *Gray's Inn Lane, London*, had one son, *William*, that succeeded him. *Ralph* married; was in *Ireland*, and had, it is said, three sons. *George*, one of his sons, came over to *England*, and after the death of *Ralph* the widow came over, with her other two sons, and lived (as *Mr. Troutbeck* of *Madras* informed me) somewhere in *Wapping, London*. She married one *Nicholson*: they went to live near her son *George* in *Kidon*, near *Corbridge, Northumberland*, where she died. This I was informed by a daughter of *George's* in 1780. *Samuel* and *Benjamin*, two of her sons, went, on this, to sea, and were both in the *Prince George* Indiaman, when she was lost near *Bombay*. *Benjamin*, with most of the crew, was drowned. *Samuel* got to *Madras*, where he married a woman from *Angengo*, and had by her two sons, both of which died young." The narrative then proceeded to trace the descent of the various members of the branch of the *Troutbecks* settled at *Blencow*, till it came to the narrator himself, whom it described as one of the three sons of *George* of *Blencow*, who was the son of another *George*, and the grandson of *William* of *Blencow*, the brother of *Ralph* already mentioned; and it spoke of him in these terms: — "*John* went over to *America* when young, under the direction of his uncle at *Boston*, in *New England*, and there served an apprenticeship to *John Greenleaf*. On account of the troubles breaking out in 1769 he came over to *England*, and, after attending various hospitals in *London*, the troubles not ceasing, he went as surgeon of one of the Honourable *East India Company's* ships, and continued in that employ till 1783, after which he went to the South of *France*, to

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all parts of *Switzerland*, and to *Rome, Naples, Florence, Venice*, and all parts of *Italy*." *

The pedigree, which was apparently drawn up at the same time with the narrative, was conformable to it, and the result to be collected from the two together was, that *George of Blencow*, the narrator's father, and *Samuel*, the testator, who died at *Madras*, were descended from the same grandfather, *William of Blencow*, and were of course first cousins; and that failing *Thomas Troutbeck*, who was described as the then rector of *Woughton*, and was the son of *John of Willingborough*, and therefore a degree nearer, the narrator and his brother would be two of *Samuel* the testator's next of kin.

The pedigree set up by the claimants was different in several respects. They, too, derived their origin from *Sir Robert Troutbeck*; but they contended, and it was established beyond dispute, that his son *George*, the rector of *Bowness*, was not the brother but the father of *William of Blencow*. According to the case they made, *George of Bowness* was the common ancestor of *Samuel* the testator, of *John* the narrator, and of the petitioners. *George* had among other children *Ralph, William of Blencow*, and *Robert of Corbridge*. Of these, *William* was the narrator's great grandfather. *Robert* died unmarried, and *Ralph* married and went to *Ireland*, where he died, leaving three sons. Two of those sons, *Benjamin* and *Samuel*, were supposed to have gone to sea early in life, and to have resided, when at home, at *Wapping*. *George* the youngest returned from *Ireland* with his mother, settled at the *Riding* in *Northumberland*, and was the claimant's grandfather: *Samuel* was the father

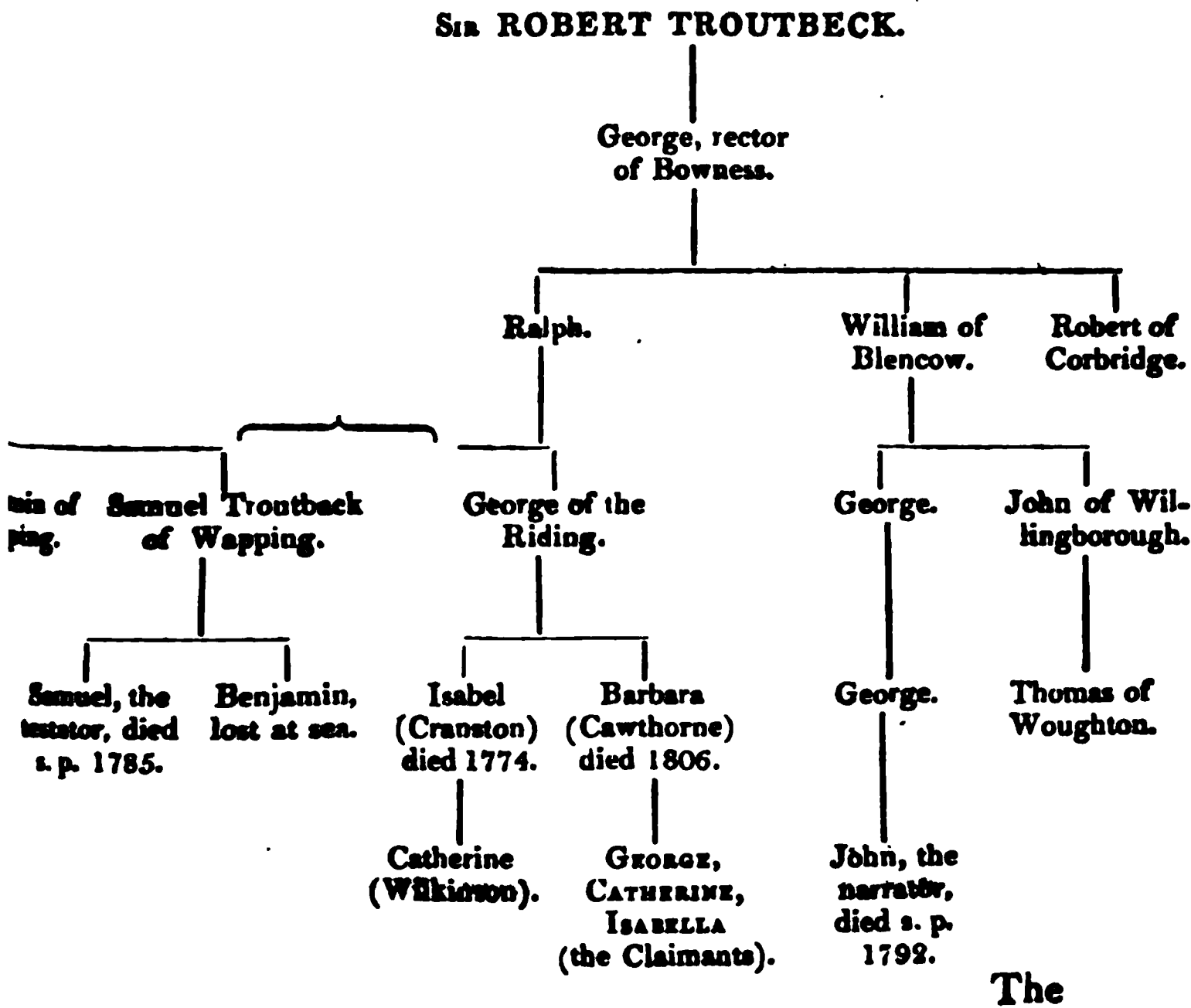
* The last passage appeared to have been added afterwards, and was in a different ink.

father of *Benjamin*, who was drowned at sea, and also of *Samuel* the testator.

It was at first conceived that the testator was a brother of *George* of the *Riding*, and this was supported by certain hearsay declarations, said to have been made by the latter many years ago, with respect to his having a rich brother in India; but on its being afterwards ascertained that the testator was the son of a *Samuel Troutback* mariner, and *Sarah* his wife, and was born in the parish of *St. John's, Wapping*, in 1700, in which points the entry in the parish register tallied exactly with the statement in the will, that supposition was given up; another generation was interjected between *George* and the testator, and *George's* declarations were explained as having reference, not to a brother but a nephew.

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The nature of the claimant's case will be understood by referring to the following pedigree: —



The

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The evidence satisfactorily proved that *George Troutbeck*, the son of *Ralph*, lived and died at the *Riding*, and that two persons of the names of *Benjamin* and *Samuel Troutbeck*, who were alleged to be brothers, and who were described as mariners, lived occasionally at *Wapping* towards the close of the 17th century. There was no difficulty in connecting the claimants and the narrator with *George* of the *Riding*: and the testator was distinctly shewn to be the son of a *Samuel Troutback* of *Wapping*: the difficulty lay in connecting *George* with *Samuel*, and as for this purpose the narrative of *John* the surgeon became, if admissible, most important evidence, the great contention on both sides related to its admissibility.

Sir *E. Sugden*, Mr. *Pollock*, Mr. *Knight*, and Mr. *Starkie*, for the claimants.

The *Attorney-General*, the *Solicitor-General*, Mr. *Wray*, and Mr. *W. Brougham*, for the crown.

On behalf of the Appellants it was first argued, that the narrative of *John Troutbeck* was admissible as evidence to prove the alleged relationship between *George* of the *Riding* and the testator; and in support of that position the following cases were cited and relied on, the *Berkeley* peerage case (a), *Vowles v. Young* (b), *Doe d. Johnson v. Pembroke* (c), *Doe v. Randall* (d), *The King v. Inhabitants of Erith* (e), *Zouch v. Waters* (g), *The King v. Eriswell* (h), *Whitelocke v. Baker*. (i) It was then insisted that, this document being once admitted,

the

(a) 4 *Campb.* 401.

(b) 13 *Ves.* 140.

(c) 11 *East*, 504.

(d) 2 *Mo. & P.* 20.


(e) 8 *East*, 539.

(g) 12 *Vin. Ab.* 244.

(h) 3 *T. Rep.* 707.

(i) 13 *Ves.* 511. The cases are all collected in 1 *Phillips on Evidence*, 232—246. 7th edit.

the evidence which it furnished was strong and important, and sufficient, when coupled with hearsay evidence of declarations, and other circumstances, to justify the Court in sending the question to be tried by a jury.

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The general nature of the arguments urged on behalf of the crown may be collected from the judgment of the Lord Chancellor.

The LORD CHANCELLOR.


Jan. 22.

After giving the fullest attention to the case, especially upon the matters of law which alone seem to require any particular deliberation, I have come to the conclusion, that I ought in this case to direct an issue.

The grounds of the argument and of my opinion resolve themselves principally into two; that which relates to the admissibility of certain evidence, and that which relates to the facts, including that evidence, namely, the weight of it, if admitted, and the other evidence in the cause.

The first consideration arises upon a document purporting to be an account prepared by a person of the name of *John Troutbeck*, a good many years ago deceased, who from his own knowledge of the family, from communications with some of its members, and from the best information he was able to obtain, appears to have digested and to have reduced into writing an account of all that he could learn, and therefore believed to be true, respecting his own relations.

The principal point in dispute was the relationship of two individuals of the names of *Samuel* and *George Troutbeck*.

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Troutbeck. John was clearly proved to have been related to one of those two, namely, to *George*: he was not proved—and that was as much in dispute as the relationship of *Samuel* and *George*—he was not proved to have been related to the family of *Samuel*; and this documentary account was objected to, as not falling within the rule which admits hearsay or declarations of deceased persons in a question of pedigree, because (it was insisted) you must first give evidence *dehors* the declarations, to connect them with the parties respecting whom the declarations are to be tendered.

I entirely agree, that in order to admit hearsay evidence in pedigree, you must, by evidence *dehors* the declarations, connect the person making them with the family. But I cannot go the length of holding, that you must prove him to be connected with both the branches of the family, touching which his declaration is tendered. That he is connected with the family is sufficient: and that connection once proved, his declarations are then let in upon questions touching that family; not declarations of details which would not be evidence, (as in one of the settlement cases referred to, where the very place of birth was sought to be proved, and Lord *Ellenborough* held they were not for that purpose receivable^(a)), but declarations of the nature of pedigree, that is to say, of who was related to whom, by what links the relationship was made out, whether it was a relationship of consanguinity or of affinity only, when the parties died^(b), or whether they are actually dead;—every thing in short, which is, strictly speaking, matter of pedigree, may be proved as matter relating to the condition of the family, by the declarations of deceased persons who, by
 evidence

(a) *King v. Erith*, 8 *East*, 539.

(b) See the following case of *Kidney v. Cockburn*.

evidence *dehors* those declarations, have been previously connected with the family respecting which their declarations are tendered.

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To say that you cannot receive in evidence the declaration of *A.*, who is proved to be a relation by blood of *B.*, touching the relationship of *B.* with *C.*, unless you have first connected him, also by evidence *dehors* his declaration, with *C.*, is a proposition which has no warrant either in the principle upon which hearsay is let in, or in the decided cases; and it plainly involves this absurdity, that if, in order to connect *B.* with *C.*, I am first to prove that *A.* is connected with *B.*, and then to superadd the proof that he is connected with *C.*, I do a thing which is vain and superfluous; for then the declaration is used to prove the very fact, which I have already established; inasmuch as it is not more true that things which are equal to the same thing are equal to one another, than that persons related by blood to the same individual are more or less related by blood to each other. It is clear, both upon principle and from the total want of any contrary authority in adjudged cases, or in the *dicta* of judges or text-writers, that the argument fails entirely, which would limit the rule respecting evidence of this description to a greater extent than by requiring you to connect with the family, by matter *dehors* the declaration itself, the party whose declaration you receive.

Neither can I accede to another limitation, for which an argument was attempted to be raised, that the declarations themselves must be looked at, to see whether they are contemporaneous or not. I do not understand this restriction, now for the first time sought to be engrafted upon the rule, but I understand very well how absurd it would be, if introduced; how completely it would
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defeat the purpose for which hearsay in pedigree is let in, by preventing it from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence. A person's declaration that his grandmother's maiden name was *A. B.* has never till this time been questioned as admissible, although it cannot by possibility be what is called a contemporary declaration, because no man can by possibility have contemporary knowledge of what his grandmother's name was before she was married. If, therefore, the word *contemporary* is to be added as a term of qualification to the subject matter of a declaration, in order to make it competent evidence, all such declarations would then clearly be excluded as go to facts, however well known in the family, which are the common matter of such evidence, and in cases of pedigree you never could go farther back than the recollection of the party swearing to the declaration of the deceased, and the life since the years of discretion, or the years when memory begins to operate, of that deceased person; a restriction which has never been acted upon by any judge, or sanctioned by any text-writer, and never to my knowledge before contended for at the bar.

It is then asked, shall we have no restriction whatever upon the admissibility of such evidence in respect of the subject matter? I have already stated one important restriction, arising from the position in which the party whose declaration is received must necessarily stand to the family. Having once shewn him to be a member of the family, by matter *dehors*, you may admit his declaration as to the relationship of any member of that family with any other, or as to the question (which comes to the same thing), whether a certain person is a relation of that family.

But


But is there no further restriction touching the subject matter, and touching the manner in which the declaration is made? Clearly there is, and nothing can be more satisfactory, or more consistent with good sense, or with legal principle and decided cases, than the summary of the doctrine given by Lord *Eldon* in *Whitelocke v. Baker*.^(a) His Lordship there observes, that the admissibility of such evidence is founded upon the presumption that the words given in evidence are the natural effusion of the party, upon an occasion when his mind stands even, without bias to exceed the truth or to fall short of it. I entirely agree that the words must be the natural effusion of the party, and that, generally speaking, he must have no bias upon his mind. But even here there must be a limit. It will be no valid objection to such evidence that the party may have stood, or thought he stood (for that would equally bias), *in pari casu* with the party tendering the declaration, and relying upon it for the purpose of his own contention; for it has been decided, that although the party deceased, whose declaration you are giving in evidence, was *in pari casu*, and, if he had been living, might have stood in the shoes of the party who tenders his declaration in evidence, that is not sufficient to exclude it.

With the exception of what is said in *Drummond's case* ^(b), where the evidence was clearly inadmissible upon other grounds, I can find no warrant for asserting that if you tender the evidence of a man by way of hearsay in a case of pedigree (and of such cases only I am now speaking), that evidence is inadmissible when it comes from a person who stood *in pari casu* with the party tendering it. Lord *Tenterden* in *Doe v. Turner* ^(c), states

^(a) 13 Ves. 511.

^(b) 1 Leach's Crown Cases, 378.

^(c) 1 Ry. & Mo. 142.

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states the law to be directly the other way, and he refers to a peerage case in the House of Lords, where the declarations of a deceased husband were given in evidence on the part of his son, although the husband was so far *in pari casu* with the claimant, that if the son was entitled to the peerage then, the husband ought to have been a peer likewise. A stronger instance of similarity of situation than this can hardly be conceived, and the case certainly seems to go a great way. But without pronouncing an opinion upon that decision, it is perfectly settled, both upon reason and authority, that the rule cannot be so far restricted as to exclude evidence, on account of the bias supposed to operate on the person making the declaration, in consequence of his being in the same situation, touching the matter in contest, with the party relying upon that declaration.

One restriction, however, clearly must be imposed; the declarations must be *ante litem motam*. If there be *lis mota*, or any thing which has precisely the same effect upon a person's mind with *litis contestatio*, that person's declaration ceases to be admissible in evidence. It is no longer what Lord *Eldon* calls a natural effusion of the mind. It is subject to a strong suspicion that the party was in the act of making evidence for himself. If he be in such circumstances, that what he says is said, not because it is true, not because he believes it, but because he feels it to be profitable, or that it may hereafter become evidence for him, or for those in whom he takes an interest after his death, it is excluded, both upon principle and upon the authority of the cases, and among others of *Whitelocke v. Baker*. There is a still more distinct authority in the *Berkeley* peerage case, where Mr. Justice *Lawrence* adopts almost the very language of Lord *Eldon* in *Whitelocke v. Baker*, and where, proceedings in equity having been instituted to

perpetuate


perpetuate testimony, evidence of declarations was rejected upon the ground of *litis contestatio*.

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Subject to that limitation, therefore, the rule as to declarations is to be taken. And regard must also be had to the occasion on which the party has emitted them. Whatever applies to the evidence of a witness spoken in the box applies equally to written declarations, provided they are brought home to the person supposed to have made them. Till then they are not declarations of one connected with the family. The occasion upon which the declaration is made is, therefore, to be taken into the account.

It was then asked, as an argument for a further restriction of the rule, "If a man may sit down to frame a pedigree, how can you receive that pedigree in evidence like an ordinary declaration, when, *non constat*, he may not have been in the act of making evidence for himself, by preparing a document which should afterwards profit him, or those in whom he is interested?" To that I answer, show me that the pedigree in question was prepared with that view. Bring it within the rule either of *Whitelocke v. Baker* or of the *Berkeley* peerage case; prove that it was made *post litem motam*, not meaning thereby a suit actually pending, but a controversy existing, and that the person making or concocting the declaration took part in the controversy; show me even that there was a contemplation of legal proceedings, with a view to which the pedigree was manufactured, and I shall then hold that it comes within the rule which rejects evidence fabricated for a purpose, by a man who has an interest of his own to serve. The question then always will be (and so far I agree with the argument for the crown), Was the evidence in the particular circumstances manufactured, or was it spontaneous and natu-

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ral? If I thought that this came within the description of manufactured evidence, manufactured for a purpose connected with the present controversy, I should of course at once have rejected it. But upon looking at it and examining it, I cannot, upon the whole, bring my mind to say that it was fabricated in such circumstances, or with such a view, as should bring it within the principle adverted to.

The competency of a pedigree as evidence in such questions has been frequently made the subject of comment, and even of judicial decisions.

One simple form of pedigree, or rather the heads of *memoranda* furnishing materials for a pedigree, is constantly admitted by every day's practice, I mean entries in family Bibles or other books kept in the family. A memorandum book, an old almanack for instance, which is not so much open to all the members of the family as a family Bible is, has upon one occasion been received: but a family Bible is open undoubtedly to the family, which may be one ground of its admissibility; and I also find, on the authority of Lord *Mansfield*, that a pedigree is admissible to prove the facts contained in the pedigree, if it be hung up in the family mansion. A ring worn publicly, stating the date of the person's death whose name is engraved on it, and an inscription upon a tomb stone open to all mankind, and erected or supposed to be erected by the family, are also received in evidence.

It is urged, however, and with considerable plausibility, that the principle of all these cases would exclude such a pedigree as this, which was not hung up or in any way made public, and to which it is not pretended that any one had access except the writer himself. But why is it that the publicity is relied upon in those cases?

Why

Why is it that the family Bible, the public wearing of a ring, the public exposure of an inscription upon a tombstone, and the public hanging up of the family pedigree in the mansion, are all relied upon in respect of their publicity? It is because, in all those cases, the publicity supplies a defect, there existing, but not here existing,—the want of connection between the pedigree, the tombstone, the ring, or the Bible, with particular individuals, members of the family. Why is it, for example, that a pedigree hung up in the family mansion is good evidence, although the person who made it is unknown, and is not proved by matter *dehors* the document itself, to have been connected with the family? Simply because of its being hung up in the mansion, where, the presumption is, it would not be suffered to remain, if the whole of the family did not more or less adopt it, and thereby give it authenticity. It is for that reason you admit such a pedigree without knowing who may have been the author. The present question, however, is simply this, Whether the pedigree would not be admissible if, instead of being publicly hung up, it were kept in the repositories of one of the family, provided you can show that it is in the handwriting of a member of that family? In this respect the case before me is clearly distinguishable from those which appear to require the publicity of the document in order to make it competent evidence.

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Adverting more particularly here to the authority of Lord *Mansfield* in *Goodright v. Moss* (a), “An entry in a father’s family Bible,” says his Lordship, “an inscription on a tomb-stone, a pedigree hung up in the family mansion, are all good evidence.” What follows clearly shows that Lord *Mansfield* did not not consider publicity

(a) *Cowp.* 591.

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licity indispensable, and it is equally clear that he did not consider the circumstance of a man who makes a pedigree, or an entry, or a declaration in writing, or even a declaration in conversation, having an object in making it, provided that object be not connected with a controversy touching the matter in question, a sufficient ground to exclude such evidence. His Lordship's words are, "I have known advice given to a father and mother to make attested declarations in writing under their hand of the precise time of the birth of the bastard *eigne*, and the subsequent marriage, to prevent controversy in the family touching the inheritance." This may be said, perhaps, to be going great lengths; but at all events it sanctions the doctrine, that the having a distinct object in view, in making a declaration in writing or by parol, even though the object can only be gained by afterwards using the declaration in evidence, is not sufficient, *per se*, to exclude that declaration; for, continues Lord *Mansfield*, "If the credit of such declarations is impeached, it must be left to the jury to judge of it." In plain terms, if a father or a mother make a pedigree for the purpose of preventing disputes in the family, his Lordship says he will admit that pedigree in evidence even when those very disputes arise, because it was not made with a view to their own interest, but to preserve a *constat*, as it were, on record of facts peculiarly within their knowledge (which is one of the main grounds of admitting such hearsay declarations); and the observation that it was made for the purpose of settling family disputes, and may not have been so spontaneous and natural as some of the *dicta* of the judges would seem to require, shall only go to its weight and credit with the jury, and shall not preclude its admission by the Court.

Another restriction was a good deal pressed, that you cannot mount, as it were, an hearsay upon an hearsay; but

but that what is given in evidence as hearsay must only be of the first degree, so to speak ; in other words, that after connecting *A.* with the family, it is competent, after his death, to give in evidence declarations made by *A.* as to what came within his own personal knowledge, but not declarations as to what he had heard respecting the family from others. There is no warrant, however, for any such distinction. The declarations tendered in evidence may either refer to what the party knew of his own personal knowledge, or, as is much more frequently the case, to what he had heard from others to whom he gave credit; for they are only adduced as evidence of reputation in the family, and that is the only mode in which the tradition in a family can be proved, and the subject-matter of that tradition can be perpetuated in testimony.

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This has been clearly held in *Athol v. Ashburnham*, a case decided in the fourteenth year of the reign of *George II.*, and cited with approbation by Mr. Justice *Buller* in his work on the law of *Nisi Prius*. (a) The declarations of a person connected with the family were there given in evidence as to what he knew and had heard, not of course as to specific facts unconnected with matter of pedigree, but, — the subject matter of the declaration being a matter of pedigree, with respect to the relationship of parts of the family or the fate of members of that family, — his declaration at second hand was received in evidence, as well to what he had heard, as to what he himself personally knew.

Notwithstanding, therefore, the introductory part of this document, wherein *John Troutbeck* sets forth that he had collected the best information he could procure, that he had received some information from the testator,
Samuel

(a) *Bull. N. P.* 295.

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Monro
 a
Attorney
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Samuel himself, with whom he had at one time lived in the same country, and that he had only *heard* what he states, making use of the expression "it is said;" notwithstanding the circumstances which alone raise the ground of objection last referred to, I am of opinion, upon the whole, that the document, proved to be in the handwriting of *John Troutbeck*, who is certified by the master to be connected with *George*, is admissible, and good evidence to go to a jury, with the view of connecting *Samuel* with *George*. All that has been said respecting the mistake into which the narrator certainly did fall as to the degree of relationship between them, all that has been said respecting the discrepancies between the narrative and the will, and the mistake of confounding *Samuel* the father with *Samuel*' the son, I lay entirely out of view; for such observations apply not to the admissibility, but only to the credit of the document.

Coming now to the second branch of the question, to the effect, namely, of the evidence when admitted, I am decidedly of opinion that if this document is let in, and if the rest of the evidence in the cause, some parts of which very remarkably corroborate other parts of it, goes before a jury, there is a possibility, and something more than a possibility, that *Samuel* and *George* may be found to have been brothers, or nephew and uncle, and in that case the claim will be established. There is a perfect possibility, perhaps a probability, that the jury may find the other way. But this is precisely the case for an issue. The case, and the only case for refusing it, is, when there is reason to believe that the finding of the jury can be in no other way but one.

Two issues were accordingly directed to try the question, whether the claimants were the next of kin of
Samuel

Samuel Troutbeck the testator. The issues were tried at the *York Spring* assizes in 1831, when the jury found a verdict for the crown.

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A motion was subsequently made for a new trial; but the Lord Chancellor, after hearing Sir *E. Sugden*, Mr. *Pollock*, Mr. *Blackburn*, and Mr. *Starkie* in support of the application, refused to disturb the verdict.

KIDNEY v. COCKBURN.

July 15. 21. 31.

IN this suit, which was instituted for the specific performance of a contract for the purchase of certain freehold premises in the city of *London*, an important point respecting the extent to which hearsay evidence is admissible in cases of pedigree was very fully considered. The question arose upon the title of the Plaintiff claiming as heir at law of a lady of the name of *Christian Kidney* who died in 1826; and in order to make out his title in that character, it became necessary for the Plaintiff to show that *John Kidney* the Plaintiff's grandfather, and *David Kidney* the grandfather of *Christian Kidney*, who were admitted to have been the sons of one *Jonathan Kidney* of *Markct Harborough*, were born of the same mother. By an order of his Honor the Vice-Chancellor, affirmed by the Lord Chancellor on appeal, the parties were directed to proceed to a trial in the Court of Common Pleas upon the following issue:—"Whether *John Kidney* and *David Kidney*, children of *Jonathan Kidney*, were brothers of the whole blood." Upon the trial it was established that *Jonathan* had been twice married; that his first wife died in *March* 1693, and his

Semble, that in a pedigree case, statements contained in monumental inscriptions, and hearsay declarations made by a deceased relative, are competent evidence to prove the respective ages of the persons to whom they refer, as well as the fact of their relationship to each other.

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second wife in *November* 1703; and for the purpose of showing that his sons, *David* and *John*, must have both been children of the first marriage, there were tendered in evidence, first, as to *David* (whose burial appeared from the parish register to have taken place on the 23d of *December* 1750), certain inscriptions, one on an old tomb-stone in the cemetery, the other on a monumental tablet in the church of *Market Harborough*, wherein *David* was stated to have died on the 16th of *December* 1750 at the age of 64 years. There were then tendered, as to *John* (who according to the entry in the parish register was buried on the 9th of *February* 1760), various declarations made by a deceased grandson of *John*, and also a letter written by the same grandson many years ago and sent by post to his brother the Plaintiff, stating that *John* their grandfather was seventy years of age when he died. The issue was tried before Chief Justice *Tindal*, who refused to receive the inscriptions, declarations, and letter, on the ground that, although admissible for the purpose of showing the relationship, they were not admissible as evidence to prove the ages of the several parties referred to therein, these being facts which the learned Judge was of opinion could not be proved by hearsay. The jury found for the Defendant; and his Lordship, as appeared from his note, was satisfied with the verdict, provided he was right in rejecting the evidence above stated; but the note added, that if such evidence of the age at which the two children of *Jonathan* died ought to have been admitted and was believed by the jury, there would then be no doubt that *John Kidney* and *David Kidney* were brothers of the whole blood.

Sir *E. Sugden*, Mr. *John Campbell*, and Mr. *Wakefield*, moved for a new trial.

The

The evidence in question was improperly rejected by the Judge who presided at the trial; and if it had been admitted, its effect must have been decisive in the Plaintiff's favour. There is no rule of law, which, in cases of pedigree, limits the admissibility of evidence of that description to the mere purpose of proving the relationship of parties: the particular nature or degree of their relationship, as uncle and nephew, cousins or the like, is as much a special fact as their ages at a given time or their comparative seniority; and it has never been contended that the statements on a tomb-stone, or the declarations of a deceased relative, are not good evidence upon those points. If admissible for one, they must be admissible for every purpose. Where is any rational line to be drawn? Neither in the cases, where the nature and effect of hearsay evidence have been discussed, such as *Goodright v. Moss* (a), and *Vowles v. Young* (b), nor in the answers of the Judges to the third and fourth questions in the *Berkeley* peerage case (c), has the distinction taken by Chief Justice *Tindal* been ever hinted at, much less recognised. *The King v. Erith* (d), which may seem an exception, was considered rather as a settlement than a pedigree case, and is therefore distinguishable; besides, it has been over-ruled by *Higham v. Ridgway*. (e) In *Higham v. Ridgway* hearsay evidence was admitted as to the time of a person's birth. And *Herbert v. Tuckall* (g), where, in order to prove a testator to have been under age, an almanac containing an entry by his father of the date of his son's birth was produced on a trial at bar, and admitted to be strong evidence, is an express authority to the same effect. In *Ryder v. Malbone*, lately tried before Mr. Justice *Littledale* at the
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(a) *Cowp.* 591.

(b) 13 *Ves.* 140.

(c) 4 *Campb.* 409.

(d) 8 *East*, 539.

(e) 10 *East*, 109.

(g) *T. Raym.* 84. 12 *Vin. Ab.* 203.

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Stafford assizes, an inscription on a tomb-stone, stating the death of a party at the age of ninety years, was admitted evidence, and the age was in that case material.

The *Solicitor-General* and Mr. *Cockburn*, *contra*.

The ground of admitting the evidence in *Herbert v. Tuckall*, and *Goodright v. Moss*, was the peculiar means of knowledge to which the parent had access, as appears from Lord *Ellenborough's* observations in *Roe v. Rawlings*. (a) *The King v. Erith*, however, is quite decisive, and has never been over-ruled or impeached. One of the inscriptions is a mere copy of the other; and as some of them are dated as late as 1770, and they are all apparently executed by the same hand, they cannot come within the description of *contemporaneous*. Neither are they set up in the view of the surviving relatives, the only principle on which monumental inscriptions are admissible, *Whitelocke v. Baker* (b); for at the time referred to, all the members of the *Kidney* family had long ceased to have their residence at *Market Harborough*. How far is the relaxation of the strict rule to be carried? The silence of the books and the absence of authority on the subject show beyond dispute that the doctrine now contended for is as new as it would be dangerous.

The LORD CHANCELLOR at the close of the argument intimated a very strong opinion in favour of the admissibility of the evidence, but said that as the point was one of some nicety he should reserve his judgment till he had time to consider it farther.

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His Lordship stated that his original impression was strengthened by the result of his farther consideration,
and

(a) 7 *East*, 279.(b) 15 *Ves.* 511.

and by the concurring opinions of Mr. Justice *Park* and Mr. Justice *Littledale*, to whom he had submitted the point; but as the decision was a matter of great importance, with a view to future cases, he had come to the resolution of sending the question to the Judges of the Court of King's Bench, in the form of a case for their opinion.

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Ockendon.

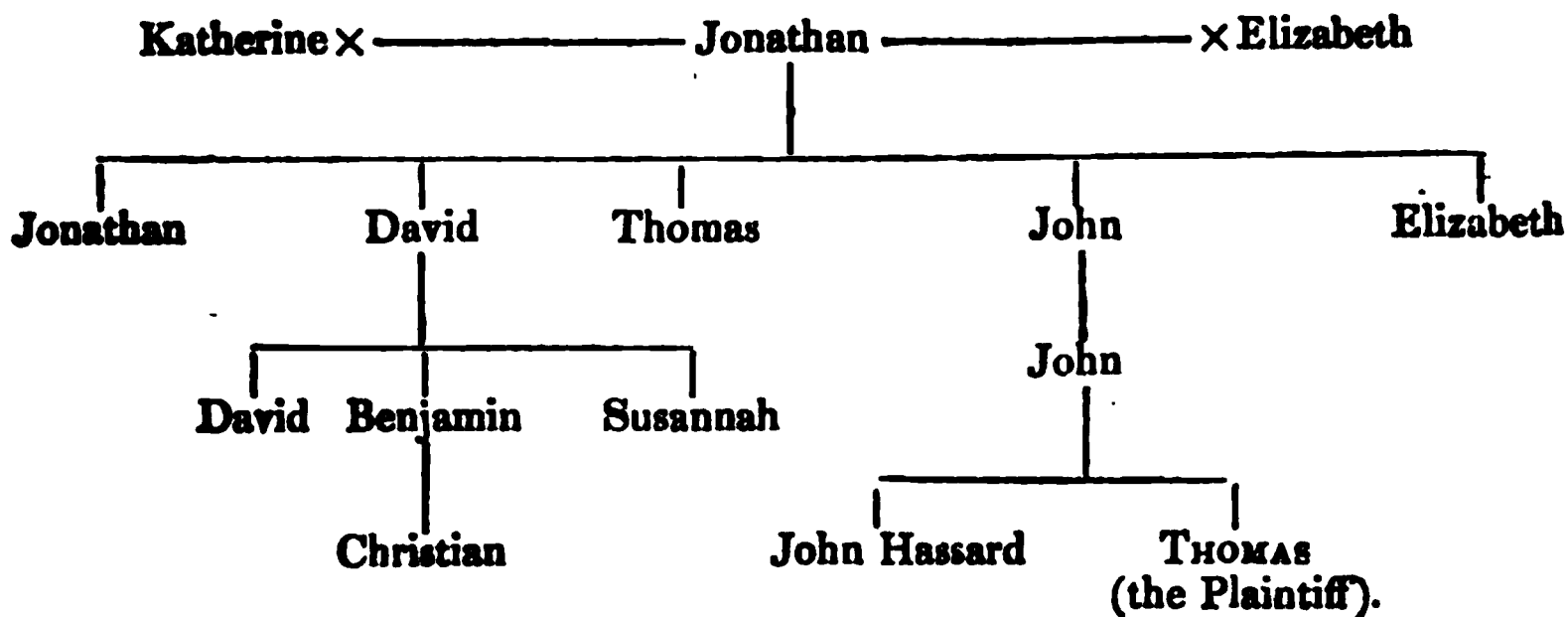
The cause was soon afterwards compromised, so that no farther proceedings were had.

The following is the material part of the order, as it was finally settled by the Lord Chancellor himself: —

After reciting the order made by the Vice-Chancellor for the issue, and that such issue was tried on the 15th day of *June* last, when certain documents and matters offered to be given in evidence by the Plaintiff were rejected by the Court, and that a verdict was found for the Defendant, to the effect that *John Kidney* and *David Kidney* were not brothers of the whole blood, the decree stated, as the allegation of the Plaintiff's counsel, "That the Plaintiff is desirous that a new trial should be had of the said issue, conceiving that the question in this case is, whether the Plaintiff *Thomas Kidney* is the heir at law of *Christian Kidney* in the pleadings mentioned? and so much of the pedigree is to be taken for admitted as shows that the Plaintiff *Thomas Kidney* was the grandson of *John Kidney* the elder, and that the said *Christian Kidney* was the grand-daughter of *David Kidney* the elder, and that the said *David Kidney* and *John Kidney* were sons of *Jonathan Kidney* of *Market Harborough*, deceased; and the question is, whether the said *David Kidney* and *John Kidney* were brothers of the whole blood?

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blood? The following is the pedigree as applicable to this question, omitting dates, and places of births, marriages, and burials:—




Jonathan the son was buried in *January 1685*, *Katherine* the first wife was buried in *March 1694*, *Elizabeth* the second wife was buried in *November 1703*. In order to show that *David Kidney* the elder was a son of the first marriage of the said *Jonathan Kidney*, the father of *David* and *John*, there is tendered in evidence an original inscription on a tomb in the cemetery of *St. Mary*, belonging to *Market Harborough*, which is as follows:— ‘In memory of Mr. *David Kidney*, [who departed this life the 16th of *December 1750*, aged sixty-four years].’ There is given in evidence an examined copy of the burial register of the said *David*, whereby it appears that he was buried at *Market Harborough* on the 23d day of *December 1750*; and there is tendered an examined copy of a monumental inscription in the church at *Market Harborough*, erected by *Benjamin*, a son of the said *David Kidney* the elder, which monumental inscription is as follows; that is to say, — ‘In the cemetery of *St. Mary*, belonging to *Market Harborough*, are interred the remains of *David Kidney*, gentleman [who died the 16th of *December 1750*, aged sixty-four years]; of *David* his eldest son by *Christian*, sister of

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Sir *Robert Kite*, late Lord Mayor of the city of *London* [who died the 24th of *November* 1770, aged thirty-three years]; and of *Benjamin Kite*, gentleman, brother of Sir *Robert*, [who died the 15th of *July* 1747, aged forty-two years,]—in pious remembrance of a kind father, an affectionate brother, and an indulgent uncle, *Benjamin Kidney*, Esq. erects this memorial.' There is given in evidence an examined copy of the baptismal register at *Market Harborough* of the said *Benjamin Kidney*, whereby it appears he was baptised the 15th of *May* 1739. In order to show that the said *John Kidney* the elder was the son of the first marriage of the said *Jonathan Kidney*, the father of *David* and *John*, there is given in evidence the burial register of *John*, whereby it appears he was buried on the 9th of *February* 1760; and there are tendered in evidence by a witness named *Ann Kidney*, the widow of *John Hassard Kidney* (the Plaintiff's brother), declarations often made to her by her husband in his life-time, that his grandfather, *John Kidney* the elder of *Coventry* (the brother of the said *David Kidney* the elder), was seventy years of age when he died. There is further tendered in evidence a letter written by the said *John Hassard Kidney* to the Plaintiff *Thomas Kidney* dated the 24th of *April* 1788, and bearing the general post-mark, in which the said *John Hassard Kidney* states the age of his grandfather, the said *John Kidney*, when his said grandfather died, to be seventy years. If the passages within the brackets in the said inscriptions on the tomb and monument are received, they would show by a reference to the age and time of death of *David* that he was born in the year 1686, and, consequently, that he was a son of the first marriage. If the said declarations made verbally and by letter are received, they would show by reference to the age of *John* at the time of his burial that he was born in the year 1690, and, consequently, that he was a son of the first

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first marriage. The admissibility of the passages in the monument not included in the brackets is not in dispute; and the question for the opinion of the Court is, whether the passages in the said inscriptions on the tomb and monument enclosed in brackets, and the said declarations offered to be proved by the witness *Ann Kidney*, and the letter of *John Hassard Kidney*, or either and which of them, be admissible in evidence to prove the pedigree in dispute? It was therefore prayed that a new trial of the said issue may be had; whereupon, and upon hearing, &c. *His Lordship doth order* that a case be made for the opinion of the Judges of the Court of King's Bench, and that the question be, whether or not the passages in the said inscriptions on the tomb and monument enclosed in brackets, and the said declarations offered to be proved by the witness *Ann Kidney*, and the letter of *John Hassard Kidney*, or either and which of them, be admissible in evidence to prove the pedigree in dispute," &c.

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STANTON v. HALL.*

1830.

Dec. 13. 15.

1851.

Jan. 21, 22. 24.

JOHN HALL the elder devised to trustees certain messuages, tenements, and hereditaments, whereof he was seised in fee, to hold the same unto the said trustees and the survivor of them, and the heirs of such survivor, upon trust to pay and apply the rents, issues, and profits of the said messuages, &c., into the proper hands of his son *John Hall*, or to permit and suffer his said son to take and receive the said rents, issues, and profits, to and for his own use and benefit for his life, but so as the same should not be assignable by him or liable to his debts or engagements; and in case his said son should at any time become insolvent, and execute any assignment or other instrument for the benefit of his creditors; or should commit any act of bankruptcy, and be thereupon declared a bankrupt; or should assign over the said rents; then out of the rents, issues, and profits of his said messuages, &c. to pay and apply one annuity or clear yearly sum of 100*l.* unto the wife of his said son, in case she should be living, upon any of such events as aforesaid happening; the said annuity or yearly sum to be paid to her or her assigns for the term of the life of his said son; and after the death of his said son, upon trust to pay and apply one annuity or yearly sum of 30*l.* to her and her assigns, so

Devise of lands to trustees upon trust, to pay the rents and profits to *J. H.* for life, but if he should attempt to assign the same, or should commit an act of bankruptcy, or become insolvent, then upon trust to pay thereout to the wife of *J. H.* an annuity of 100*l.* during his life, and after his decease, an annuity of 30*l.* during her widowhood, and upon certain other trusts as to the residue for the children of the marriage:

Held, that the annuity of 100*l.* was not the separate estate of

the wife, but passed by the husband's assignment to a purchaser for value; and, that as against such purchaser, the wife had no equity for a settlement out of the annuity.

* This and several subsequent cases, relating to the wife's separate estate, and the nature of

her equity to a settlement, it has been considered expedient to report together.

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long only as she should continue his widow. And after any of such events as aforesaid happening, and subject to such annuities and charged therewith, the said trustees were to stand seised and possessed of the said hereditaments and premises, upon trust for all and every the children of his said son, in manner therein mentioned, with benefit of survivorship and accruer, &c.

On the death of the testator, *John Hall* the younger was let into possession of the devised estates. During his continuance in possession, he represented himself to be the absolute owner of the property; and in that character executed a deed, purporting to convey the fee-simple of the devised estates to a mortgagee; — a fraud which he was enabled to practise the more easily, as he bore the same name with his father the testator, and suppressed all mention of the will. Some time afterwards, *John Hall* the younger took the benefit of the Insolvent Debtors' Act; and this suit being then instituted by the incumbrancer for the purpose of enforcing his security over all the interest, whatever it might be, which *John Hall* the younger took under the devise, the question came ultimately to be, whether, in the event which had happened of *John Hall's* insolvency, his wife, upon the true construction of the father's will, was entitled to the annuity of 100*l.* to her sole and separate use, or whether it belonged to her husband, and was therefore in equity affected by the mortgage?

A motion was made on behalf of the Plaintiff, that some person might be appointed to receive the annuity during the pendency of the suit; but the Vice-Chancellor refused the motion, at the same time intimating an opinion that, upon the words of the will, the wife must be considered as entitled to the annuity for her sole and separate use.

The

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The application for a receiver having been renewed before the Lord Chancellor, it was agreed, after some discussion, that as there was no evidence to be adduced in the cause, it would be expedient, for the sake of avoiding delay and expense, to argue the question upon the merits, and to consider the judgment given upon the motion as if it were the decree pronounced at the hearing, so as finally to decide the cause.

Sir *E. Sugden* and Mr. *Ching*, for the Plaintiff, contended that the question was not what the testator by the particular form or phraseology of the limitations had intended to do, but what he had actually done. It was not enough to shew a probable intention to exclude the *jus mariti* from the property of the wife: the language used must be sufficiently strong to prevent the possibility of its attaching; the object being to deprive the husband of his legal rights, by creating a separate beneficial interest in the wife, as if she were *sui juris*, in a manner unknown and repugnant to the principles of the common law. To effect such an object no particular form might be necessary, but the expressions, whatever they were, must amount to a total exclusion of the husband; as for example, the phrases "to the sole" or "to the separate use" of the wife, or "to be at her disposal" and "independent of" her husband. *Ex parte Ray*. (a) The case of *Johnes v. Lockhart* (b), cited in *Ex parte Ray*, was mis-stated in the report; but the error was pointed out and corrected in *Wills v. Sayers* (c), and the notion that a gift to a *feme covert* for her own use gave her a separate estate, was afterwards exploded in *Roberts v. Spicer*. (d) In *Packwood v. Maddison* (e), a legacy to a married

(a) 1 *Madd.* 199.

(c) 4 *Madd.* 409.

(b) Correctly stated in Mr. *Bell's* note, 3 *Br. C. C.* 383.

(d) 5 *Madd.* 491.

(e) 1 *Sim. & St.* 252.

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married woman, for her support, to be secured by an annuity, was held to vest in the husband, and pass by his assignment. The rule to be collected from all the authorities was, that in order to vest the property in the wife, to her separate use, the instrument must be so expressed as to be inconsistent with any other rational construction. There was, however, nothing irrational in supposing the existence of an intention which the testator had, from ignorance, neglected the proper means of executing; as appeared from an analogous case of frequent occurrence, where a clause of forfeiture failed of effect for want of the necessary limitation over. No case went the length of deciding that a proviso, divesting a husband of a beneficial interest in property, and thereupon vesting it in the wife, should be construed as giving her the property to her sole and separate use: and courts of equity, which had already gone quite far enough in relaxing the strictness of the law on this subject, would not now be disposed to carry the relaxation farther.

Mr. *Knight* and Mr. *K. Parker*, for the Defendant, Mrs. *Hall*.

It is admitted that no particular form of expression is required, in order to vest a separate estate in a married woman to the exclusion of the marital right. Neither the word "sole" nor the word "separate" is indispensable. A direction that she shall hold what is given, independently of her husband, or that her receipt shall be a sufficient discharge, is equally effectual for that purpose; the question always being upon the intention of the donor, as it is to be collected from the whole instrument taken together, *Lee v. Prieaux* (a), *Prichard v. Ames* (b), *Ex parte Beilby*. (c) The objection that the

Defendant

(a) 3 Bro. C. C. 381.

(b) T. & Russ. 222.

(c) 1 Gl. & J. 167.

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Defendant is here seeking to defeat a legal right, does not apply; for the legal estate is in trustees, and the interest, whatever it be, which the husband and wife are to possess, is equitable only. The limitation is to the wife, in opposition and contradistinction to the previous limitation to the husband. The subject matter of the gift is, by express words, taken from him upon the happening of a certain event; and in words equally express, a portion of it is thereupon directed to be paid and applied to the wife during the continuance of the coverture; and at the husband's decease her allowance is to be reduced from 100%. to 30%. a year. All these circumstances raise an irresistible implication that the testator meant to bestow on Mrs. Hall, in the event which he apprehended and therefore provided for, of the son's bankruptcy or insolvency, a separate property in the annuity which she might employ at her discretion in the support of herself and her husband. Any other construction would be irrational and absurd; for, besides disappointing what was the obvious intention of the donor, it would render the clause of limitation over absolutely null. The conveyance made by John Hall the younger to the Plaintiff, was *ipso facto* void; and, by the express provision of the will, operated as a forfeiture of all his interest, for the benefit in part of the wife; but what would that forfeiture and the limitation over avail, if the partial interest thereby vested in her, were to be instantly re-transferred to the husband, in order to become once more, by a sort of equitable fiction, the subject of his original assignment? Nothing could be more directly adverse to the avowed purpose of the testator.

Sir E. Sugden, in reply.

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Dec. 14.

The LORD CHANCELLOR said it was clear that no particular form of words was necessary in order to vest property in a married woman to her separate use. That intention, although not expressed in terms, might still be inferred from the nature of the provisos annexed to the gift; as where, for example, the direction was that the property should be at the wife's own disposal, or that her receipts should be a good discharge; circumstances which raised a manifest implication that the marital right was meant to be excluded. In the present case, however, nothing appeared upon the language or limitations of the will, from which such an inference could be safely drawn, and a receiver must therefore be appointed.

1891.

Jan. 21. 22.

The cause was brought on again, for the purpose of having it determined how far *Mrs. Hall* was entitled to claim a settlement out of the annuity; a point which had been postponed till the decision of the general question.

Sir *E. Sugden* and Mr. *Ching*, for the Plaintiff, submitted, that as this was an annuity given to the wife for her husband's life only, and not a principal sum of money vesting in her absolutely, it fell clearly within the principle laid down by Sir *J. Leach* in *Elliott v. Cordell* (a); a case less strong than the present, inasmuch as the wife there took an interest in the dividends of the stock bequeathed, during the continuance of her own life, whereas here the 100*l.* annuity was only given her for the life of her husband.

Mr.

(a) 5 *Mad.* 149. and 1 *Russ.* 71. note.

Mr. Knight and Mr. K. Parker, *contra*.

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HALL.

Till that case was decided the rule was laid down broadly, that the wife's equity for a settlement out of her *choses in action* must invariably prevail against assignees for valuable consideration, *Pope v. Crashaw* (a); and it is impossible to suggest a reason why it should not apply to a life interest in such property as well as to interests of a larger description. *Elliott v. Cordell* first attempted to introduce the distinction, for which no previous authority can be cited, and which is entirely at variance with principle. The notion that a husband, by maintaining his wife, becomes, as it were, a purchaser of her life estate, and, therefore, capable of assigning it, was suggested in *Pryor v. Hill* (b), before Lord Alvanley, but without success.

Elliott v. Cordell merely decided that the Court would not, at *the suit* of a married woman, compel a settlement out of *choses in action* bequeathed to her for life, against the particular assignee: but the reasoning on which the judgment proceeds would justify a contrary decision in the present case; for the Master of the Rolls drew a marked distinction between an assignment by the husband to a purchaser for value, *before* he had failed in supporting the wife, and the general assignment in bankruptcy, from which his incapacity to support her followed as a necessary consequence. Here, the very act by which the title of the Plaintiff was created constituted a forfeiture on the part of the husband, and deprived him of the means of maintaining his wife; so that the Plaintiff is to be considered rather in the light of a general than a particular assignee.

The

(a) 4 Bro. C. C. 326.

(b) 4 Bro. C. C. 139.

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Jan. 24.

The LORD CHANCELLOR.

This case involves the question how far a married woman, to whom an annuity for life was bequeathed in terms which have been adjudged not to vest it in her as her separate estate, is entitled to claim a settlement out of it, against one who was a purchaser for valuable consideration from her husband, the husband having afterwards become insolvent. And as *Elliott v. Cordell*, if it should be held to be law, decides the question, I have looked with some attention into that case, and also into the former authorities; and I find no warrant for supposing that *Elliott v. Cordell* introduced any new doctrine upon the subject. The same doctrine, in principle, was recognised long before by Sir *W. Grant*, although, undoubtedly, neither in *Mitford v. Mitford* (a), nor in *Wright v. Morley* (b), was the point raised and disposed of formally. It was, however, repeatedly referred to in those cases; and it is perfectly plain, from the language there used, that the opinion of Sir *W. Grant* would have excluded the wife's claim as against particular assignees. If the question were now for the first time raised, whether courts of equity had not gone farther than principle warranted, in allowing the claim against particular assignees, in cases where a capital sum was at stake, some doubt might, perhaps, be entertained; but in a case like *Elliott v. Cordell*, where the question related to a mere life interest, and where, prior to the assignment, there was no failure on the part of the husband to maintain his wife, the Vice-Chancellor would have gone a great step farther, had he listened to the argument in favour of the wife's equity. (c)

Reg. Lib. B. 1830. f. 917.

(a) 9 *Ves.* 87.(b) 11 *Ves.* 12.

(c) In *Lumb v. Milnes*, 5 *Ves.* 517. where a wife was declared to be entitled for life to the interest and dividends of a fund,

a settlement was directed out of it, against the husband's assignees: so also in *Brown v. Clark*, 3 *Ves.* 166. and *Jacobs v. Amyatt*, 1 *Madd.* 376. n.

1831.

TYLER v. LAKE.

August 13.

BY a settlement executed in *August* 1825, the Honourable *Catharine Tyler*, widow, conveyed certain estates to trustees and their heirs, upon trust, immediately after her decease, to sell and dispose of the said estates, and after paying off the incumbrances affecting the same, to stand possessed of the surplus produce of such sale, and of the rents and profits in the meantime, upon further trust, to distribute the residue of the monies to arise therefrom, among all the sons and daughters of the said *Catharine Tyler*, namely, *John Tyler*, *Catharine*, the wife of *John Cooke*, *Betty Maria*, the wife of *John G. Anthony*, *Barbara Tyler*, *William Tyler*, *Caroline Tyler*, *Mary Jane Tyler*, and *Caroline Ann Tyler*, if all of them should be then living, in equal proportions, share and share alike, but subject to the limitations and declarations thereafter contained concerning the same respectively, (that is to say,) as to the shares and proportions of *Catharine Cooke* and *Betty Maria Anthony* respectively, "in trust to pay the same into their own proper and respective hands, to and for their own respective use and benefit, in case they should respectively be living at the time of the decease of the said *Catharine Tyler*, or the time of payment or distribution of the said monies;" but in case either of them should be then dead, then the share of such of them as should be then dead should be payable to their respective husbands, the said *John Cooke* and *John G. Anthony*, if then living, "to and for their own respective use and benefit absolutely," but in case they or either of them the said *John Cooke* and *John G. Anthony* should also

Lands were settled upon trust after the death of the settlor, to sell the same and distribute the proceeds among all the settlor's children *nomination*; and as to the shares of two who were married women, the trustees were directed to pay the same "into their own proper and respective hands, to and for their own use and benefit;" but in case they should be then dead, to pay their shares to their respective husbands for their own use and benefit: Held, that these shares did not vest in the married women to their separate use.

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have departed this life, leaving lawful issue by their said respective wives, then their respective shares were directed to go over and be paid to and among their children respectively in manner therein mentioned. By subsequent clauses in the settlement, the shares of the four unmarried daughters were directed to be laid out in the funds, or on mortgage, and the dividends and interest to be paid and applied to them or their assigns, "to and for their own proper and respective use and benefit," during their respective lives, with a power of appointment by deed or will. The share of the son, *John Tyler*, was in like manner directed to be invested, and the interest and dividends to be paid to him "for his own proper use and benefit," with certain remainders over in trust for his children. And lastly the share of the other son, *William Tyler*, was directed to be held by the trustees upon trust to "pay the same into the proper hands of the said *William Tyler*, to and for his own use and benefit," in case he should be living at the death of the settlor, but if he should be then dead, his share was to be invested upon certain trusts for the benefit of his wife and family as therein mentioned.

Upon the death of Mrs. *Tyler*, the settlor, a bill was filed to carry into effect the trusts of the settlement, and under a reference directed by the decree, the Master reported that *Betty Maria*, the wife of *John G. Anthony*, was entitled to one eighth part of the money which should be produced by the sale of the said estates, and to have one eighth part of the intermediate rents and profits paid to her, into her own proper hands, for her own use and benefit. To this report the assignees of *John G. Anthony*, who had, in the meantime, become a bankrupt, took an exception, on the ground that the bank-

rupt

rupt was entitled to the said one eighth share of the produce and rents, in right of his wife *Betty Maria*, and the Vice-Chancellor allowed the exception. (a)

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 TYLER
 v.
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Mrs. Anthony appealed from that decision.

Mr. Pepys and *Mr. Girdlestone*, for *Mrs. Anthony*, contended that, looking as well to the general frame of the settlement, as to the very special nature of the proviso which accompanied the trust for the married daughters, there could be no reasonable doubt of the donor's intention to exclude their husbands from acquiring any interest in the settled property so long as those daughters were alive. This was clearly to be inferred from the subsequent limitation in the deed, whereby the husbands, in the event of their surviving, took by express gift the identical interest in the property which had been previously limited to their wives. *Stanton v. Hall* (b) had been strongly relied upon in the Court below as negating such an inference; but that case did not, like the present, contain a distinct clause, that the share of the wife should be paid into her own proper hands, to and for her own use and benefit. If any doubt remained upon the effect of the successive limitations, that clause must completely remove it. A gift to a married woman, to be paid into her own proper hands, could have no other possible meaning than that the payment should be made personally to her, and that the right to receive it should vest in her to the exclusion of her husband. *Hartley v. Hurle* (c) was a direct recognition of the principle. *Hoovey v. Blakeman* (d), *Lumb v. Milnes*. (e) It followed, as a necessary consequence, that she, and not

(a) 4 Sim. 144. where the settlement is set out more fully.

(b) *Ante*, p. 175.

(c) 5 Ves. 540.; and see 18 Ves. 454.

(d) 9 Ves. 524.

(e) 5 Ves. 517.

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not the husband, was the person competent to give receipts to the trustees, a direction which had always been held to vest a separate estate in the wife. The subsequent words, "to and for her own use and benefit," would, if that were required, come forcibly in aid of the construction given to the preceding passage; *Adamson v. Armitage*. (a) *Wills v. Sayer* (b), and *Roberts v. Spicer* (c), which apparently deny the effect of the word "own" in a gift of this kind, turned upon the fact that there the testators plainly shewed, from the language of other parts of the instrument, that they did not mean to use it in a strict sense. It was unnecessary to go through the cases, which were all ably collected in *Roper* (d); but the general doctrine to be extracted from the whole was this, that the Court would infer an intention to exclude the husband from any circumstances or expressions which were inconsistent with the full enjoyment of the marital rights. *Darley v. Darley* (d), *Wagstaff v. Smith*. (e)

Sir E. Sugden, Mr. Knight, and Mr. James Campbell, who appeared on the other side, were not called upon to support the decree.

The LORD CHANCELLOR.

The decision in *Stanton v. Hall*, referred to in the Court below, was not come to without grave consideration; and it would stand unimpeached even if the judgment now under appeal were to be reversed. That decision has no application at present, except in as far as

(a) 19 *Ves.* 416.; *Coop. C. C.* 283.; and see *Tyrrell v. Hope*, 2 *Atk.* 558.

(b) 4 *Madd.* 409.

(c) 2 *Rop. H. & W.* 157—65. *Jac. ed.*

(d) 3 *Atk.* 399. but as to this case see 3 *Bro. C. C.* 384.

(e) 9 *Ves.* 520.; and see *Dixon v. Olmius*, 2 *Cox*, 414.

as it sanctions the doctrine, that if a sufficient strength of negative words is not to be found in the gift or limitation, you are not allowed to fish about for indications of intention from other parts of the instrument: to that extent it is an authority for excluding any positive inference which might be drawn from the words here relied on, —“ as to the shares and proportions of *Catharine Cooke* and *Betty Maria Anthony* respectively, in trust to pay the same into their own proper and respective hands, to and for their own respective use and benefit.”

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This clause is materially different in its expression, and may be said to be more exclusive than the language of the will in *Stanton v. Hall*. It consists of two parts, the direction to pay the rents and profits into their own proper and respective hands, and the direction that the payment shall be for their own respective use and benefit.

With regard to the latter, I can easily understand the argument that the word “own” may at one time have been held in law to be synonymous with “sole:” but after it has been solemnly decided, as it was by the present Master of the Rolls in *Wills v. Sayers*, and *Roberts v. Spicer*, that that expression standing alone is not sufficient to exclude the marital right, and that in this respect “sole” is a phrase of greater efficacy, I should hold it to be a less sound principle of construction to return to what may have been the old rule, than to adhere to the authority of these modern cases.

Neither do I think that the direction which is super-added, —“ to pay the shares into their own proper hands,” —either taken singly or in connection with the rest of the clause, is sufficient to create a separate estate in the wife. The only authority cited for such a proposition

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position is *Hartley v. Hurle*, which was a case under peculiar circumstances, and in which that was not the point principally considered. It is entirely a mistake to suppose that *Lumb v. Milnes* decided any thing of the kind. The rule laid down long ago by Sir *H. Grimston*, when he said in a case somewhat similar (*a*), that where there were no negative words in the will to exclude the husband, he could not deprive him of his legal rights, — a principle distinctly recognized in *Wills v. Sayers* and *Roberts v. Spicer*, — is directly opposed to the construction here contended for. I take the principle, therefore, to be now thoroughly established, that courts of equity will not deprive the husband of his rights at law, unless there appears to be a clear intention manifested by the testator that the husband should be so excluded.

If these be the principles that regulate the construction of a will, how much more forcibly ought they to apply to a case like the present, of a limitation contained in a deed? I have looked into the authorities referred to of *Hovey v. Blakeman*, which bore some resemblance to the case at bar, and *Wagstaff v. Smith*, where the bequest was to the wife, independent of her husband; but in these and in all the other cases, expressions will be found introduced which exclude the marital right in express terms, by giving the property to the wife's separate use; or, (what has been held to amount virtually to the same thing,) the donor annexes some direction or condition to the gift, in a manner incompatible with the existence of the husband's right. Of this nature are the phrases "to be at the wife's own disposal," or, "to be enjoyed independent of the husband," or, "her receipt to be a good discharge." But here the rents may

(*a*) *Dakins v. Berisford*, 1 Ch. C. 194.

may be directed to be paid into the proper hands of the wife, and yet she may be incompetent to give a receipt to the trustees. Probably the words were used without any very distinct perception of their meaning (a): "proper" is the Latin form of the word "own," and can mean nothing more.

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On the principle, then, which requires the husband to be excluded by expressions that leave no doubt of the intention, and which forbids the Court to speculate on what the probable object of the donor might have been, and not on the authority of *Stanton v. Hall*, unless in as far as it sanctions that doctrine, I have no hesitation in affirming the Vice Chancellor's judgment.

(a) It is to be observed, that this opinion derives confirmation from the language of the gift to *William Tyler*, although his Lordship did not advert to that circumstance in his judgment.

1891.

Feb. 8, 9.

FENNER v. TAYLOR.

A husband, whose wife was entitled to a fund in court, signed a memorandum after marriage, agreeing to secure half her property on herself: Held, (reversing the decision of the Court below,) that it was competent for the wife to waive this agreement, and that any benefit which her children might have taken under it was defeated by her waiver.

THE circumstances under which the question in this case came before the Court, are correctly stated in Mr. *Simons's* report, vol 1. p. 169.

The Vice-Chancellor having decided that the agreement of the husband enured for the benefit of the children, and that the wife was incompetent to waive it, an appeal was brought from his Honor's judgment.

Sir *E. Sugden* and Mr. *Roupell*, for the appeal, observed, that there were two points to be considered: first, whether the agreement which formed the basis of the proposed settlement was a contract binding upon the husband; and next, supposing it to be so, whether it could be waived by the wife, who was now willing that the fund to which it referred, should be paid to her husband. The first point depended upon the effect of a voluntary agreement by a husband with his wife, made after marriage, and before any decree had been pronounced, affixing to the instrument a particular construction, or directing it to be carried into execution. The precise question was decided by Sir *W. Grant*, upon this identical agreement, but with reference to another portion of the fund; for on the 8th of *July* 1813, an order was made at the Rolls, whereby it was directed that a legacy of 3000*l.* should be paid to the husband, after an affidavit had been read to the Court, stating that there was no settlement, or agreement for a settlement, unless the paper writing here referred to was to be construed

as

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as such. (a) In this conflict of opinion between two eminent judges, it became necessary to consider how the matter stood upon principle. In an ordinary case, the agreement would be of no value, and could not be executed, inasmuch as it contained no precise or sufficient description of the property to be settled. It was, besides, an instrument purely voluntary, and though it might possibly be enforced against the grantor, if made in favour of parties for whom there was a moral obligation to provide, such as a wife or children, still it could not be carried beyond the actual terms expressed in it, and these referred solely to the wife, who being alone interested would surely have a right to forego the benefit if she pleased. In point of fact, the wife never accepted, and she now distinctly repudiated it; and if she took nothing under the agreement, much less could her children, whose only claim was derived through her, and who were never within the contemplation of the parties. The case of *Ex parte Gardner* (b), relied upon in the court below, was very different in its circumstances, and had no application. That was the case of a husband undertaking to settle an estate of his own upon his wife and family in strict settlement, in consideration of obtaining the wife's property. The proposals, signed by both parties, had been carried in before the Master, and the Court would not afterwards permit the husband to escape from his engagement, by accepting the waiver of the wife. The children were there provided for in express words: whereas here the memorandum was confined strictly to the wife, for whom only, therefore, the settlement (which would be to her sole and separate use) could be enforced. The Vice-Chancellor apparently considered this agreement as substituted for

(a) Reg. Lib. 1812. A. fol. 939. under the name of *Fenner v. Thompson.* (b) 2 Ves. Sen. 571.

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for the wife's equity, and thence he drew an inference that the benefit of a settlement, made in pursuance of it, ought to be extended to the children of the marriage. But if it were a mere substitution, his Honor's argument was inconsistent: for as a wife may clearly waive the benefit of her equity for herself, up to the last moment before the order for the settlement has been pronounced; and by doing so will defeat the equity of her children; the waiver of this agreement by the wife ought of course to be equally effectual against the interests alleged to be created by way of substitution for that equity, *Murray v. Lord Elibank*. (a)

Mr. *Treslove* *contra*, in addition to the cases cited on the former argument, relied upon *Barker v. Lea* (b) as an authority to shew that a married woman having once asserted her equity to a settlement cannot afterwards be permitted by any act of hers to destroy the rights which her claim has vested in her children. *Scriven v. Tapley* (c), *Steinmetz v. Halthin*. (d)

The LORD CHANCELLOR.

Before delivering my decision upon the question before me, it may be proper first to say a few words respecting the cases of *Ex parte Gardner* and *Murray v. Lord Elibank*, because considerable reliance was placed on

(a) 10 *Ves.* 84. and 15 *Ves.* 1.

Where, however, the wife was a ward of Chancery, and the husband, after being committed for a contempt in marrying her, was liberated on undertaking to make a specified settlement, the Court would not afterwards allow the wife to waive it, *Stackpole v. Beaumont*, 3 *Ves.* 89.

(b) 6 *Madd.* 330.

(c) 2 *Eden*, 337.

(d) 1 *G. & J.* 64. Where the children have been omitted in the settlement directed by the Court, the omission, if it has been long acquiesced in, will not be supplied after the wife's death, *Johnson v. Johnson*, 1 *J. & W.* 479.

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on the former, and because the reported judgment of Sir *W. Grant* in the latter contains a remark which would seem to set Lord *Hardwicke* and Lord *Eldon* at variance. Upon looking into the report of *Murray v. Lord Elbank* (a), when the cause first came before Lord *Eldon*, we find his lordship laying it down clearly that although the wife, if she please, may call for a declaration that she is entitled to a provision out of the fund for herself and her children, it is nevertheless competent to her, even after an order for a settlement is completed, to waive that equity for herself and her issue. If a settlement be insisted upon, it must be for the benefit of the children as well as of the wife, but (to use his lordship's words) "if the issue have a right against the father, it is dependent altogether on the will of the mother." In a subsequent stage of the same cause, Sir *W. Grant* observes, "It seems to be assumed in the argument both here and before Lord *Eldon*, that it was competent to the mother to waive the settlement at any time, before it was actually completed: that is, even after a proposal given in by the husband. Lord *Hardwicke*, however, determined the contrary, stating, that though the wife might give up her interest in the money, if she pleased, yet nobody could consent for the children, which may be. That does not directly apply to this case; as, I believe, no proposal was laid before the master in this case." (b) When we refer to what Lord *Eldon* says, he certainly does not state in terms that if the proposal had been carried in, it might still be waived, although his language seems capable of that construction. But with respect to *Ex parte Gardner*, to which Sir *W. Grant* refers, as a contrary determination of Lord *Hardwicke*, it is quite unnecessary for me to impeach the

(a) 10 Ves. 84.

(b) 13 Ves. 5, 6.

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the authority of that case, for it differs most materially from the case at the bar, inasmuch as the proposals, which had there been signed by both parties, and sent in to the master, expressly included a settlement on the family; a circumstance which of itself forms a marked distinction.

Without adverting to the grounds upon which His Honor rested his judgment in the present case, it is certain that the very question now submitted to the Court has been already decided by his learned predecessor, and in this identical cause. His Honor, it is true, was not aware of that decision, for the language of his judgment is, "It is said, that a case *like* the present came before Sir *W. Grant*, and that he permitted the wife to waive the agreement: but the case not being in print, I am neither acquainted with the particular facts of the case, nor with the reasons upon which Sir *W. Grant* proceeded." (a) With those facts, however, I am now fully acquainted. Instead of 270*l.*, the sum which is here in contest, the sum on the former occasion was of much larger amount; and all the circumstances which exist here, namely, the communications that took place with *Taylor*, and the memorandum of the 22d of *December*, 1810, which has been rather incorrectly described as a contract, being the memorandum which formed the foundation of the wife's equity, and which, it was said, she could not waive, must have been the very ground of Sir *W. Grant's* judgment. I must presume therefore that the exact question now before me was formally submitted to Sir *W. Grant*, and by him decided in the affirmative; and, consistently with that decision, I feel myself bound to reject the construction which His Honor has put upon this agreement.

The

(a) 1 *Sim.* 172.

The judgment pronounced upon that occasion, coming, as it did, from the same eminent Judge who had so recently considered the whole of this subject in the latter stage of *Murray v. Lord Elibank*, is entitled to no ordinary weight; more especially when it is recollected that Sir *W. Grant* carried the respect due to voluntary conveyances to its utmost limits, and that his decision in *Sloane v. Cadogan* (a) pushed that doctrine at least as far, perhaps I might say farther, than any of the preceding authorities had gone. Upon these grounds I am of opinion that the order of the Court below must be reversed.

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v.
TAYLOR,

The cause came on again at the Rolls, upon a petition praying that another portion of the same fund might be paid out to the husband with the consent of the wife. On that occasion, the proceedings which had taken place before the Lord Chancellor were stated to His Honor, who expressed a wish that the petition should stand over, in order that he might consider the point farther, and have time to look into the authorities.

1833.

February.

The MASTER of the ROLLS, in acceding to the prayer of the petition, observed, that when he refused the former application he was not aware that the precise point had been already decided by Sir *W. Grant*, in this very cause, in favour of the wife's right to waive a settlement founded on the identical agreement here in question, and that that fact was first brought to his knowledge by the judgment of the Lord Chancellor. Whatever, therefore, his own individual opinion might be

March 12.

(a) *Sugd. V. P. Appendix*, 817.

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he or might have been, he felt himself bound, on a petition like the present, which was by the same parties, and arose out of exactly the same circumstances, to follow the decision pronounced by his Lordship, and to permit the husband, with the consent of the wife, to receive the benefit of the fund now in question. Nevertheless, the reasons upon which he had formerly come to a different opinion (and to that opinion he still felt disposed to adhere) appeared to him to be of considerable weight, and he thought it his duty to restate them. In his view of the case, as the particular form of the settlement was not specified in the memorandum, a court of equity, if it were called upon to execute the agreement, would direct a settlement to be made in the ordinary form of marriage settlements; and the children, consequently, would be entitled to a benefit conformable to the usual course in such settlements. Although the Lord Chancellor and Sir *W. Grant* appeared to have considered that the agreement here was merely voluntary, and that a court of equity would not carry it into effect, it amounted, as it seemed to him, to a purchase, by the husband, of the wife's equity to a settlement, and could not be regarded as a mere voluntary instrument. His Honor added that, upon looking into the reports with a view to authorities upon this subject, he had found a case which was exactly in point, *Blois v. Lady Hereford* (a), where it was expressly laid down that, under such circumstances, a husband was a purchaser of his wife's equity; and in his opinion, therefore, the agreement of Mr. *Fenner* was not without consideration.

(a) 2 *Vern.* 501. and see *Lloyd v. Williams*, 1 *Madd.* 450.

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WOODMESTON v. WALKER.

Rolls.

Feb. 15.

L. C.

Aug. 12. 15.

THE testator, *Henry Watson*, disposed of one third part of his residuary estate in the following manner: — “ One other full and equal third part thereof I hereby direct to be laid out by my executors in the purchase of a government annuity for the life of my sister *Rebecca Woodmeston*; which annuity so to be purchased I hereby give and bequeath unto my sister *Rebecca*, to and for her own sole and separate use and benefit, and independent of any husband she may happen to marry; and I direct that her receipt or receipts, notwithstanding her coverture, shall be good and sufficient discharge and discharges for the same, and to be for her personal benefit and maintenance, and without power for her to assign or sell the same by way of anticipation or otherwise.”

Rebecca Woodmeston was a widow at the date of the will, and had continued so ever since; and she filed the present bill, praying to have it declared that she was entitled absolutely to the one third part of the testator's residuary estate.

Mr. Bickersteth and *Mr. Bacon*, for the Plaintiff.

It is an established principle of the Court, that where an annuity is directed to be purchased, and the annuity, if purchased, might be immediately sold by the person to whom it is given, the annuitant is entitled to take the

A testator directed that one third of his residuary estate should be invested in the purchase of an annuity for the life of a female, who was single at the date of the will and the death of the testator, and this annuity he gave to her separate use, and independent of any husband she might happen to marry, and without power to sell or assign the same by anticipation. The Master of the Rolls, upon the ground that the restraint against alienation or anticipation would be valid in case of future coverture, refused to order payment to the legatee of the price which would

be paid for the annuity. But the Lord Chancellor held that she was entitled, if she chose, to the fund at once, without having it laid out, and that this option was not affected by the clause against anticipation.

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FENNER
v.
TAYLOR.

he or might have been, he felt himself bound, on a petition like the present, which was by the same parties, and arose out of exactly the same circumstances, to follow the decision pronounced by his Lordship, and to permit the husband, with the consent of the wife, to receive the benefit of the fund now in question. Nevertheless, the reasons upon which he had formerly come to a different opinion (and to that opinion he still felt disposed to adhere) appeared to him to be of considerable weight, and he thought it his duty to restate them. In his view of the case, as the particular form of the settlement was not specified in the memorandum, a court of equity, if it were called upon to execute the agreement, would direct a settlement to be made in the ordinary form of marriage settlements; and the children, consequently, would be entitled to a benefit conformable to the usual course in such settlements. Although the Lord Chancellor and Sir W. Grant appeared to have considered that the agreement here was merely voluntary, and that a court of equity would not carry it into effect, it amounted, as it seemed to him, to a purchase, by the husband, of the wife's equity to a settlement, and could not be regarded as a mere voluntary instrument. His Honor added that, upon looking into the reports with a view to authorities upon this subject, he had found a case which was exactly in point, *Blois v. Lady Hereford* (a), where it was expressly laid down that, under such circumstances, a husband was a purchaser of his wife's equity; and in his opinion, therefore, the agreement of Mr. Fenner was not without consideration.

(a) 2 Vern. 804. and see *Long v. Long*, 10 Ves. 407.

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WOODMESTON v. WALKER.

Rolls.
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Rebecca Woodmeston was a widow at the date of the will, and had continued so ever since; and she filed the present bill, praying to have it declared that she was entitled absolutely to the one third part of the testator's residuary estate.

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the value of the annuity, without going through the form of purchase. In this case the annuity, if purchased, might be sold by the Plaintiff; for the clause against sale and anticipation is void, inasmuch as the Plaintiff, at the time of the will and of the testator's death was, and still is a single woman. In the case of a bequest to a male, a restraint on alienation is of no effect unless the property be limited over, *Brandon v. Robinson* (a); and the restraint, when imposed on a married woman, ceases as soon as the coverture is at an end, *Barton v. Briscoe*. (b)

Mr. Pemberton, contra.

In *Barton v. Briscoe* the will contemplated no marriage except that which was actually subsisting; and the opinion of Sir *Thomas Plumer* can be maintained only on the ground that it was not the intention of the testator to extend the restriction to future coverture. Here it is a future marriage which is guarded against. If alienation may be restrained in the case of actual coverture, why may it not be restrained prospectively with a view to future coverture? The testator has sought to throw a certain protection round the object of his bounty, in the event of her afterwards marrying; and the Court is now called upon to defeat his intentions entirely.


The MASTER of the ROLLS.

In the case of *Barton v. Briscoe* the restraint against alienation was, by the terms of the settlement, applied only to the actual coverture with the settlor which subsisted at the time, and it necessarily determined, therefore, upon his death. Here the restraint applies to the
coverture

(a) 18 Ves. 429.


(b) Jac. 603.

coverture with any husband whom the annuitant may happen to marry.

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 v.
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If the Plaintiff had been actually married at the death of the testator, it is admitted that the restraint would have been good; and the question is, whether a testator can impose such a restraint with respect to a future marriage? At law a wife can have no separate estate; and it is only by the principles of a court of equity that such an estate is permitted, for protection against the legal rights of the husband. To give full effect to that protection, the rule in equity permits a restraint upon the power of disposition, which would be invalid in any other case; and I cannot satisfy myself that there is any substantive distinction between a present coverture and a future coverture. It is a familiar case, that where the interest of a legacy is given to an unmarried female for life, to her separate use, in case of coverture, and the power of sale or anticipation is restrained, then, in case of a future marriage, and a sale or anticipation of the interest during the coverture, this Court holds that sale or anticipation void, although by the terms of the will the life-interest of the legatee is not limited over upon that event; and no right accrues by the prohibited act to any other person. That doctrine applies to the present case, where one argument is, that the Plaintiff is solely interested in the annuity.

Upon the whole, in the absence of authority to support the claim of the Plaintiff, I am not prepared to say that, upon the doctrines of this Court, the power of disposition which is incident to property may not be restrained in the case of the future marriage of a female who is single at the time of the gift.

1831.

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 WALKER.
 August 12.

The Plaintiff, Mrs. *Woodmeston*, appealed from His Honor's decree, dismissing the bill,

Sir *E. Sugden* and Mr. *Bacon*, for the Plaintiff.

If the bequest of the annuity stood alone, the Plaintiff's right to insist upon receiving the fund itself, in lieu of the annuity to be bought with it, would be indisputable; for the recent decision in *Dawson v. Hearn* (a), where all the authorities were considered, has set that point at rest. The only doubt is, whether the clause against anticipation can effectually control this right, because the legatee happens to be a female, although she is unmarried and of full age. The case of *Dawson v. Hearn* went some way towards deciding that point also; for the argument drawn from the obvious purpose to secure a permanent provision for a widow, instead of giving her a gross sum, would apply equally in the present instance, and was there urged without success; although it must be allowed that the purpose of this testator is more strongly indicated, by the anxiety with which the language of his will has guarded against any imprudent wasting of the fund. But admitting the intention to be clear, the inquiry remains, Has the testator resorted to the proper means for carrying that intention into effect? How stands the matter upon principle? At law, every person who acquires an estate must take it with all its incidents; and one of the most essential incidents to the right of property is the power of alienation, which no clause or proviso can restrain or take away. And the same principle has been repeatedly recognized in equity; *Brandon v. Robinson* (b). The object therefore can only be attained indirectly, by annexing the prohibited act as a condition, upon the hap-

pening

(a) 1 *Russ. & M.* 606.

(b) 18 *Ves.* 429. and 1 *Rose*, 197.

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pening of which the original estate is to determine, and a new estate to vest in another party. Without such a gift over, the strongest words of prohibition are ineffectual. (a) The doctrine introduced by Courts of Equity with respect to the interests of married women, so far from being an infringement of the principle, are perfectly consistent with it, and supply neither argument nor analogy in favour of His Honor's judgment. Lord *Eldon*, following Lord *Thurlow*, held that the interest which a married woman took in property settled to her separate use, was purely the creature of equity, which this Court was therefore at liberty to mould and deal with, as might be deemed best for her advantage, or most agreeable to the wishes of the donor. Accordingly, with respect to property which is so settled, the Court considers the wife as a *feme sole*, notwithstanding her coverture, and there, the restriction on alienation is allowed; whereas here, the Plaintiff being a *feme sole*, and of course *sui juris* at law, the power of the Court is not required for her assistance or protection, and the restriction cannot be effectually imposed. The very point was decided in *Barton v. Briscoe* (b), where Sir *T. Plumer* held that the restraint on anticipation by a wife ceased upon the husband's death; and that decision was approved and followed by Lord *Gifford*. It may be said, that as the words of this proviso point to any future coverture, the restriction will attach upon the Plaintiff the instant she marries a second husband, and that the Court looking to that contingency, will protect the executors in their refusal to transfer the fund. For such a proposition, however, no authority can be adduced. The language of the judgment in *Barton v. Briscoe* is directly opposed to it, and the existence of a desultory and

(a) *Lear v. Leggett*, 1 Russ. & M. 690. and the cases there cited.

(b) *Jac.* 603.

1881.

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and shifting fetter of that description is repugnant to legal principle, and would be attended with much practical inconvenience.

Mr. *Pepys* and Mr. *Kindersley*, for the executors.

After the decision in *Dawson v. Hearn*, it is too late to contend that executors have in general a right to invest the fund bequeathed for the purchase of an annuity, in defiance of the express wishes of the annuitant. But this is a peculiar case. The legatee is a female, and the clauses prohibiting anticipation, and excluding the rights of any future husband, prove it to have been the testator's settled purpose that an annuity should be purchased for his sister at all events. It is true, that where a father is anxious to deter his daughter from making an imprudent marriage, he may declare that, upon the happening of the apprehended event, the property which he bestows on her shall go over; but frequently this will not answer his purpose, for if, notwithstanding the forfeiture, the forbidden marriage takes effect, his child will be left destitute. For this reason clauses against anticipation are constantly introduced into settlements, which are intended to provide for females; and no distinction is ever taken with reference to the fact of their being married or single. The practice of conveyancers, who expressly exclude the control of any after-taken, as well as of any present husband, and the language of judges who have considered this subject, equally countenance the restriction in both cases (*a*); it being a relaxation of the strict rule of law, grounded simply on the sex and condition of the party, which call for extraordinary protection against the importunities and influence

(*a*) See what is said by the judges in *Beable v. Dodd*, 1 T. R. 195. a case which was not cited.

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v.

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fluence to which coverture, whether present or prospective, may expose her. In *Barton v. Briscoe*, the prohibition was confined to the then subsisting marriage, and the judgment only decided, what nobody disputes, that, in the absence of a special restriction, a *feme sole* stands in the same situation as a male. It is not to be denied that the instrument, whether deed or will, might divide the quantity of interest given into periods, so as indirectly to effect the desired result,—by limiting it, for example, to the party so long as she continued a *feme sole*, with a direction that when she became covert it should vest, *toties quoties*, in trustees for her separate use, without power to anticipate. In substance that is done here. The Plaintiff, therefore, would have power to dispose of her annuity till her marriage, and the instant that event took place the restraint upon anticipation would attach.

It is quite immaterial, however, whether a shifting restriction of this kind is, or is not effectual; for the real question for the Court is, what was the intention of the testator, as it is to be inferred from these peculiar provisions. There is nothing which prevents a testator from imposing it, as a necessary condition of his bounty, that the gift shall be taken in whatever form and mode his prudence or caprice may dictate; provided only he express his purpose with sufficient clearness. Here it is impossible to doubt that the ruling idea in the testator's mind was, to secure to his sister for her life a competent and permanent provision, which should give her no trouble in the management, which she should have little temptation to dissipate, and of which no after-taken husband should be able to deprive her.

The

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The LORD CHANCELLOR.

WOODMISTON

v.
WALKER.

August 15.

The question in this case is, whether a prohibition against anticipation, annexed to a provision bequeathed to a woman for her separate use, notwithstanding any coverture, and she being at the time and still continuing unmarried,—whether that prohibition so modifies the nature of the property bequeathed, as to render the interest which she takes incapable of being aliened.

The rule of law which prevents a party from imposing fetters upon property inconsistent with the nature of the interest given, is precisely the same, I apprehend, in personal as in real estate. Thus, where the subject is a personal chattel, it is impossible so to tie up the use and enjoyment of it, as to create in the donee a life-estate which he may not alien: although the object may be attained indirectly, in a manner consistent with the known rules of law, by annexing to the gift a forfeiture or defeasance on the happening of a particular event, or on a particular act being done; for in that case the donee takes by the limitation a certain estate, of which the event or act is the measure; and upon the happening of the event, or the doing of the act, a new and distinct estate accrues to a different individual. If a testator be desirous to give an annuity without the power of anticipation, he can only do so by declaring that the act of alienation shall determine the interest of the legatee, and create a new interest in another. In none of the cases bearing upon this subject (and they are very numerous) can any warrant be found for the proposition, that at law an inalienable estate can be created without any gift over. There is no gift over in the present case, which is that of a mere naked prohibition, not guarded by any clause of forfeiture.

In

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WALKER.

In this Court it has been held, that where property is given to a married woman to her sole and separate use, alienation may be prohibited in respect of the property so settled, without annexing any limitation over, to operate by way of defeasance of the first estate; and the ground on which that has been supported by Lord *Eldon* and Lord *Thurlow* appears to be clearly consistent with itself and with legal principle, but to have no application to the present case.

Baron and *feme* being one person in law, no separate estate could at law be enjoyed by the wife against the husband, so as not to be liable to his engagements or control. Nor was it till after a considerable struggle (as appears from the language of Lord *Cowper* in *Harvey v. Harvey* (a)), that courts of equity ventured to introduce a different doctrine, and to hold that personal chattels might be so given to a married woman as to vest in her alone, to the entire exclusion of her husband. That doctrine, however, has now been long established, insomuch that it has in later times become a regular mode of settling property on a *feme covert*, to convey it by such a form of words as shall expressly exclude the marital right, and place her, in respect of that property, exactly in the condition of a *feme sole*.

As the separate estate of the wife was thus the invention of equity, it followed, that the same court which invented, might mould and modify its own creation in whatever manner it thought fit. It is by force of the donor's intention, to which in the case of a *feme covert* equity gives effect, that, contrary to the rule of law, a married woman is permitted to hold property in this peculiar manner. And it is strictly in accordance with the same principle

(a) 1 P. Wms. 125.

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v.
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principle that equity allows such restrictions to be imposed on the separate interest thus given, as, by qualifying the extent of her dominion over it, may, in the judgment of the settlor or testator, best secure to the object of his bounty the full and uncontrolled enjoyment of the property for her own benefit. It was upon this ground that a proviso prohibiting the wife from aliening her separate estate, or a clause against anticipation, as it has been called, was first introduced in Miss *Watson's* settlement: upon this ground the validity of such a proviso has been recognized by Lord *Thurlow* (a), and subsequently upheld by Lord *Eldon* in *Jones v. Harris* (b) and various later cases; and it is now perfectly well established that, with respect to personal estate settled to the separate use of a married woman, a clause against anticipation will be effectual so long as the coverture continues. No authority, however, can be found for the position, that a *feme sole* may be tied up and restricted in the dominion over her property, any more than a male, who is clearly incapable of being so restricted. The operation of the clause against anticipation, where there is no limitation over, rests entirely on its connection with the coverture, and on its being applied to a species of interest which is itself the creature of equity. The present is not a case where there is a coverture, but a possibility only of coverture; and it would be going farther than the authorities warrant, and be violating legal principle, to give effect to an intention of creating an inalienable estate in a chattel interest conveyed to the separate use of a *feme sole* (which estate, till her marriage, or after the husband's decease, she might otherwise deal with at discretion), simply because

(a) See *Pybus v. Smith*, 3 Bro. C. C. and *Parkes v. White*.
11 Ves. 221.

(b) 9 Ves. 486.

because at some after period she might possibly contract a marriage.

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It was said that the woman might have the property at her own disposal till she married, and that when that event happened, a sort of postponed fetter might attach, a fetter which would fall off upon her husband's death, and be again imposed should she enter into a second marriage. That would be a strange and anomalous species of estate; nor is it very easy to conceive by what process or contrivance it could be effectually created, unless perhaps by annexing to the gift a limitation over to trustees, to preserve it for the woman during the successive covertures. But it is unnecessary to consider that question, as no such contrivance has been resorted to in this case. Here the bequest is merely coupled with a naked prohibition against alienation by the legatee. The decision in *Barton v. Briscoe*, where there had been a coverture, which was determined, proceeds strictly upon the principle adverted to; and upon the authority of that case, as well as the general principle and reason of the thing, I have no hesitation in stating that my opinion differs from that of the Master of the Rolls; and I must therefore hold that the Plaintiff takes, at her election, an absolute interest either in the one third share of the testator's residuary estate, or in the annuity to be purchased with that share.

On a subsequent day his Lordship decided that, in conformity with *Jenour v. Jenour* (a), the costs of the suit should be borne by the Plaintiff's share, as that formed a distinct fund, clearly severed from the bulk of the residue.

(a) 10 Ves. 562.

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ROLLS.

May 25.

JONES v. SALTER.*

Bequest of dividends of stock to a *feme covert* for life, not to be subject to the debts or control of her then present or any other husband, and without power to charge or anticipate the growing payments thereof: Held, that the legatee, on becoming *dis-covert* might validly dispose of her entire life-interest.

MARY BAKER, by her will dated 14th of *January*, 1802, gave to the Defendant, her executor, 2000*l.* 4 per cents., in trust, as to 1000*l.*, to permit the Plaintiff, *Joshua Jones* (since deceased), to receive the dividends for his life, and after his decease, in case the Plaintiff *Ann Jones* his wife should survive him, in trust that she should receive the dividends for her separate use for her life; and as to the other 1000*l.*, upon trust to pay to or authorize the Plaintiff *Ann Jones* to receive the dividends thereof for her life, for her separate use; “and that the same, as well as the interest, dividends, and produce of the said 1000*l.* 4 per cent. bank annuities, so bequeathed in the event of her surviving the said *Joshua Jones* her husband, should not be subject to the debts, dues or demands, and be free from the control or interference of the said *Joshua Jones*, or of any other husband or husbands with whom she might at any time thereafter intermarry, and without any power to charge, incumber, anticipate, or assign the growing payments thereof.” And the testatrix directed that the receipts of the Plaintiff *Ann Jones* alone for the dividends should be a sufficient discharge: and after her death, in case the said *Joshua Jones* should survive her, upon trust to permit him to receive the dividends for his life, and after the death of the Plaintiffs *Joshua Jones* and *Ann Jones*, upon trust to divide

* The reporter is indebted to the kindness of Mr. *Treslove* for the note of this case, in which the point principally considered

in *Woodmeston v. Walker*, ante, p. 197. was determined in the same way by Sir *W. Grant*.

divide the said sums of 1000*l.* and 1000*l.* 4 per cent. bank annuities among their four sons.

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After the death of *Joshua Jones* the husband, this petition was presented by the Plaintiff *Ann Jones*, and the eldest son, who had attained twenty-one, stating that it would be of great benefit to the son to receive his fourth part of the 2000*l.* bank annuities, and that his mother the petitioner *Ann Jones*, was desirous of assisting him by giving up her life interest in the fourth part, and therefore praying a transfer of one fourth part of the said bank annuities; and Sir *William Grant*, then Master of the Rolls, after some consideration, made an order accordingly.

Some time afterwards a similar petition was presented by the mother and the second son, on his attaining twenty-one, for the like purpose, when a similar order was again obtained from the same Judge.

Mr. Treslove, for the petitioners.

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May 23. 31.

BROWN v. POCOCK.

A clause against anticipation, annexed to a life interest in a trust fund bequeathed to a female infant, does not prevent her, after she comes of age and before marriage, from effectually assigning her whole interest in the legacy.

ANNE POCOCK bequeathed to the Defendants the sum of 6000*l.*, upon trust to invest the money and stand possessed of the trust funds, and the interest and dividends, and apply one third of such interest, or a competent part thereof, in the maintenance and support of each of the three infant daughters of *James E. Brown*, and to accumulate the residue until the infants should respectively attain the age of twenty-one, when the whole of the interest was directed to be paid to them for their respective lives in equal shares; and in case any of them should marry, one equal third part of the trust funds was directed to be held in trust for the sole, separate, and particular use of the daughter so marrying during her life, *and the dividends and interest thereof to be paid to her accordingly, but not by way of anticipation, for her separate use*; and after the decease of such daughter, her share of the trust funds was given to her children in manner therein mentioned; with benefit of survivorship among the other daughters, in case of the death of any of them, without having children who should live to obtain a vested interest in their mother's share.

The testatrix died in 1817; and a suit having been instituted for the administration of the estate, the legacy to the daughters of *J. E. Brown* was paid into Court. *Ann Elizabeth Brown*, the eldest of those daughters, attained the age of twenty-one on the 9th of *April* 1832; and in the month of *June* following, she, in consideration of 400*l.*, advanced to her by *John Hovil* for the purchase of a redeemable annuity of 40*l.* 10*s.*, assigned to *Hovil*

all

all the interest which she took under the will of *Anne Pocock*, upon trust to secure the due payment of the annuity. In the month of *October*, in the same year, *Ann E. Brown* intermarried with *Samuel Andrews*; and *Hovil* shortly afterwards presented a petition at the Rolls, praying that the amount of his annuity might be ordered to be paid to him out of Mrs. *Andrews*' share of the trust fund. The Master of the Rolls declined to make any order upon that petition; and *Hovil* thereupon appealed to the Lord Chancellor.

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Sir *E. Sugden*, for the petitioner.

The decision of this question must be governed by the judgment in *Woodmeston v. Walker* (a), where the principle on which restrictions imposed upon property taken by a *feme covert* are upheld in equity, was very fully considered, and where, in strict accordance with that principle, and with the previous cases, your Lordship held it to be clear, that unless she be *covert* at the time when the interest vests, and the coverture be continuing down to the moment when the alienation is attempted, a female of full age stands precisely on the same footing with a male, and equally with him may exercise all the rights of ownership, notwithstanding a clause against anticipation. The assignment to the petitioner was executed by Mrs. *Andrews* after she came of age and before her marriage; and it will not be seriously contended, that her subsequent coverture could nullify an act originally valid. Even if the assignment had been made posterior to the marriage, *Newton v. Reid* (b) is an authority to shew that that circumstance could not give force to a restriction which was nugatory and inept in its creation. In such a case the only mode of effectually pre-

(a) *Ante*, page 197.

(b) 4 *Sim.* 141.

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preventing alienation is by a clause of forfeiture and a gift over.

Mr. *Pepys* and Mr. *Cooper*, for Mr. and Mrs. *Andrews*.

In *Woodmeston v. Walker*, the legatee was of full age and was a widow, as well at the time when the bequest took effect, as when she asserted her claim to the entire fund; whereas at the death of this testatrix, when her interest in the legacy vested, Mrs. *Andrews* was an infant, and she is now a married woman. *Newton v. Reid* does not appear to have been much argued, and although that case was decided some time ago, it has only very recently been reported, so that it cannot yet be said to have received the sanction of the profession.

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The LORD CHANCELLOR.

The point upon which this case turns, is the effect of a clause of anticipation in a will. The bequest was in trust for the infant daughters of *J. E. Brown*; a sufficient sum for their education and maintenance to be paid out of the interest till they reached twenty-one respectively; and the whole interest of each share to be paid to each daughter for her life as she reached twenty-one, and in case of marriage then to her sole and separate use, *but not by way of anticipation*. One of the daughters attained the age of twenty-one in *April* 1832, and in *June* 1832, executed an assignment of her share of the interest to the petitioner, to secure the payment of a redeemable annuity of 40*l.* 10*s.* granted by her to him, in consideration of a sum of 400*l.*, money lent to her. In *October* she married; and her husband and she now join in opposing the application made by the grantee of this annuity to have the interest paid under the assignment,

or,

or, out of the interest, the annuity, as it becomes due, and they oppose the application on the ground of the prohibition to anticipate. The Master of the Rolls appears to have regarded the matter in this light, for he refused to make an order on the petition. I cannot agree with his Honor. I consider the prohibition quite ineffectual to tie up the fund. There is no gift over; and the legatee was not a *feme covert*: she was not indeed a *feme covert*, either at the date of the will, or at the death of the testatrix, or at the date of the assignment. In order to support the view taken below, we must over-rule all the cases, particularly *Barton v. Briscoe* (a) at the Rolls, *Woodmeston v. Walker* in this Court, and *Newton v. Reid* (b) before the Vice-Chancellor.

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An attempt is made to distinguish this case from these, but there is not even a probable argument for the distinction. In principle none of them differ, and one of them, *Newton v. Reid*, would be the same to the letter, except that it is a stronger decision than the one I am about to make. The fund was there directed to be invested in purchasing an annuity for an unmarried daughter, to her sole and separate use, in case she married, "but that she should not be at liberty in any way whatever to sell, assign, or in any way dispose of the annuity, or if she did so, such sale to be void and of no effect; the testator's intention being, if any accident in life should unfortunately happen to her, that she should be kept from want." She married; and then, jointly with her husband, assigned the fund, electing to take it and not the annuity; and it was assigned for money advanced to the husband. The Court held the restraint upon anticipation void, there being no gift over. The particulars in which that case differs from the present make it

(a) *Jacob*, 603.

(b) 4 *Sim.* 141.

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it much stronger ; for the prohibition is more particular and elaborate, and the assignment was not made, as here, while the legatee was a *feme sole* ; and though the sum in question was considerable, the decision, which was in 1830, has been acquiesced in.

Having gone at large into the principles on which questions of this kind turn, in *Woodmeston v. Walker*, I should not now have entered upon the further discussion of the cases, had it not been contended that there the legatee was not married, whereas she is, in the present case. Upon the principle this can make no difference, the assignment having here been made when she was sole. But in *Newton v. Reid*, this difference did not exist.

PAGE v. BROOM.

1850,
December.

THIS case (upon which the argument and judgment in the Court below are reported in 4 *Russell*, 177) was brought by appeal before the Lord Chancellor, who, after hearing the question elaborately argued, affirmed the decision pronounced by the Master of the Rolls.

REPORTS

OF

CASES

ARGUED & DETERMINED

1831.

IN THE

HIGH COURT OF CHANCERY.

SALWAY v. SALWAY.

1831.
Feb. 9.

THE facts out of which the question arose are stated in Mr. *Russell's* report of the case on the hearing at the Rolls. (a)

The executors of Mr. *Salway* presented a petition of appeal from the decision of his Honor the Master of the Rolls.

A preliminary objection was taken on behalf of the sureties, that as against them the Court had no jurisdiction; but the Lord Chancellor was of opinion, that inasmuch as the objection had not been urged in

A receiver appointed by the Court is answerable for the loss of monies consequent on the failure of a banker with whom they have been deposited for security, if the deposit be made in such a way that the receiver parts with the absolute control over the fund.

(a) 4 *Russ.* 60.

the banking house the sums he received, to the joint account of his sureties, under an arrangement with them, that all drafts upon the sums so paid in should be written by one of the sureties, and signed by himself. The bankers having subsequently failed, it was held (reversing the judgment of the Master of the Rolls), that the receiver was liable for the loss.

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the Court below, it was not competent for the sureties to insist upon it now; their submission to the jurisdiction at the Rolls having bound them to all intents, and including a submission to the appellate jurisdiction as an incident thereto.

Sir *E. Sugden* and Mr. *Wakefield*, for the appeal.

Mr. *Rose* and Mr. *Kindersley*, for the receiver.

Mr. *Loftus Lowndes*, for the sureties.

The following cases were cited: *Knight v. Lord Plymouth* (a), *Fletcher v. Dodd* (b), *Wren v. Kirton* (c), *Massey v. Banner* (d), *Ex parte Belchier*. (e)

The LORD CHANCELLOR.

The case is shortly this. *White* was appointed a receiver in this Court, and in order to prevail upon *Adams* and *Burlton* (who were not in partnership together), to become his sureties, he entered into an arrangement with them, by which it was agreed that the rents, when received, should be paid over to a person of the name of *Anderson* (who was a partner of the surety *Adams*), and be deposited by him at the bankers' in the joint names of the sureties, and that all drafts upon the monies so deposited should be written by *Anderson*, and signed by the receiver *White*.

The bank of *Prodgers* and Co., into which the money was so first paid, failed, and a considerable sum was thereby lost to the estate. The funds of the estate were

(a) 3 Atk. 480. 1 Dick. 120.

(b) 1 Ves. jun. 86.

(c) 11 Ves. jun. 377.

(d) 4 Madd. 413. and 1 J. & P.

W. 241. on appeal.

(e) Amb. 218.

then transferred to another bank, that of *Coleman* and *Morris*, with regard to which a similar arrangement was adopted as to the payment of money and the drawing of sums out. The dividends received from the commission were deposited in that second bank, and all the new receipts under the receivership were paid to *Coleman* and *Morris*, in the same manner in which they had been formerly paid into the banking-house of *Prodgers* and Co. before its failure. *Coleman* and *Morris* subsequently failed also; and the question is, whether or not the receiver himself, and in default of him, his sureties, should be made liable for the amount of the sum deposited with the bankers, or for the balance which the estate had lost by the double failure of the bankers.

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A good deal of argument has been raised, touching the conduct of the receiver in respect of the balances kept in his hands, and the length of time during which he allowed them to remain there, and on the slowness with which he paid them into Court; and it does appear, certainly, that though he may have rendered a yearly account, he nevertheless drew from the estate very considerable sums over and above the necessary outlay, which never much exceeded 800*l.* or 900*l.* a year, and he appears to have sometimes received other monies without putting them in, although, at the time when the payments began, he had a sufficient balance in his hands to answer necessary charges. It is not to be said that a receiver, by merely complying with the exigency of the orders requiring him to account once a year, is thereby to be, of course, exonerated from responsibility; for that period is directed as the minimum of frequency in passing his accounts with the Court. It is needless, however, to enter further into this topic,

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because the grounds upon which my judgment proceeds are independent of that consideration.

After looking minutely into the circumstances and into the cases, I cannot conscientiously arrive at the conclusion to which the Master of the Rolls came, and I cannot help suspecting, though I am told that the point was pressed upon his Honor, that the consideration to which I am about to advert was never fully presented to his mind; the more so, as I find no trace of it in his judgment, and as it is extremely material, in my view essential, to the right decision of the question. It is admitted on all hands, that if a receiver puts a fund out of his own control, so that other persons shall be able to deal with it, he guarantees the solvency of those persons, and becomes answerable for any loss that may ensue. However good his intention, the departing with the control to the extent of giving that control to another, would be enough to make him a guarantee of the fund. The principle is so obvious that I say nothing of the authorities. His Honor, indeed, has observed that the receiver here has not so far parted with the control as to enable the other person to deal with it without his concurrence. He parts with his exclusive control by associating and incorporating with himself the authority of another person. *Anderson* was to make the drafts; he, the receiver, was to sign them; and, consequently, *Anderson* was a necessary party to the drawing out of every shilling of the funds in deposit. The question, therefore, assumes a very serious aspect; and if I am to affirm this judgment, when possessed of the knowledge of an arrangement, by which an individual, not an officer of the Court, not answerable to the Court, nor recognised by it, is called in to the extent of exercising a *veto*, I cannot shut my eyes to the consequences.

quences. To hold that a receiver, although the Court confides in him, and appoints him *propter delectum personæ*, is entitled, notwithstanding, to mix up with his delegated authority another person to whom the Court is a total stranger, would be a doctrine pregnant with the greatest danger, and one for which I can find no authority. The case of *Knight v. Lord Plymouth* (a) has been much doubted, and in *Wren v. Kirton* (b), it is clear that Lord Eldon was prepared, if necessary, to have gone against it. Lord Hardwicke, it is well known, has been peculiarly unfortunate in the reporters of his decisions, and there may, therefore, have been circumstances in *Knight v. Lord Plymouth*, which, if known, would have thrown a better light upon the decision in that case. But it is unnecessary to discuss or pronounce upon the comparative authority of those cases now; for the present, as must indeed generally happen in questions of this nature, must after all be determined upon its own circumstances.

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I could not affirm the decision of the Court below without laying down this rule—that a receiver under the control of the Court, and paid out of the estate, is, nevertheless, entitled to substitute for his own discretion, responsibility, and integrity, the discretion, responsibility, and integrity of a stranger. If it be asked, what harm arises from this? I answer, the greatest; the total loss it may be of the property. Is it not one part of the discretion of a trustee, taking him to be a mere naked trustee; is it not one part of the discretion of an agent, to whom the receiver may more properly be likened, to keep the funds in the hands of the bankers so long only as they shall be safely there lodged, and to seize the moment when peril threatens, to withdraw them to a place

(a) 3 Atk. 480. 1 Dick. 120.

(b) 11 Ves. jun. 377.

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place of safety? Will it be said that he is able to exercise that discretion when he has tied up his own hands, and can no longer exercise it himself, but must apply for the consent and co-operation of another? That control was not given without an object; for it was given partly to induce the sureties to undertake the responsibility. It has been urged, that this arrangement was made in order to impose a check upon the receiver. But though any good consideration could be properly given for that purpose by the receiver himself, yet, if the consideration consists of something which directly tends to introduce the control of another, and that an irresponsible person unknown to this Court, I take it, the receiver shall be answerable for what has happened to the fund which he has so dealt with, not merely in a case where the peril can be sworn to be the cause of the loss, but where he has not so rightly conducted himself as to exonerate him from the loss, — where he has not so conducted himself as a prudent person would have done.

Cases of this description must rest upon their own merits. But they are of great importance to the parties and to the Court. Receivers might be very prone to extract a general rule, amounting to a licence to neglect the strict line of their duty, if this judgment had not been critically considered, and if the doctrines that appear to be held by the Master of the Rolls had been confirmed.

This case, under the title of *White v. Baugh*, having been carried by appeal to the House of Lords, the judgment of the Lord Chancellor was affirmed without costs, in the month of *July* 1835.

1881.

AMPHLETT v. PARKE.

Jan. 7.
Feb. 11.

MARTHA CLAY by her will, executed and attested so as to pass freehold estates, disposed of her property as follows: — “I give and devise all my freehold and copyhold estates, in the county of *Essex*, unto and to the use of *Nicholas Martyn*, Esq., and *Rawson Parke*, Esq., their heirs and assigns, upon trust to sell the same either by public auction or private contract; and I will and direct that the monies to arise from such sale be considered and taken to be part of my personal estate.” — After directing that the receipts of her trustees should be sufficient discharges to purchasers, the testatrix proceeded as follows: — “And I do hereby will and direct, that out of the monies to arise from such sale, and out of all other my personal estate, the several legacies hereinafter mentioned be paid and satisfied; (that is to say”) &c.—The testatrix then gave a number of pecuniary legacies to different persons by name; and among the rest, one of 1000*l.* to *Elizabeth Parke*, and another of the like amount to *Lydia Amphlett*. She then continued in these words: — “And all the residue of my personal estate, and of the monies arising from the sale of my real estates, I give and bequeath to the before named *Nicholas Martyn*, his executors, administrators, and assigns, upon trust to pay the interest thereof to the before named *Elizabeth Parke* for her life, for her separate use, and after her death, upon trust to pay and divide the capital

A testatrix gave her real estates upon trust to be sold, and directed the monies to arise from such sale to be considered and taken as part of her personal estate; she then willed, that out of the monies to arise from such sale, and out of all other her personal estate, certain pecuniary legacies should be paid; and bequeathed all the residue of her personal estate, and of the monies arising from the sale of her real estates, upon trust for two persons and their children. Some of the pecuniary legatees having died in the testatrix's life-

to,

time; it was held (reversing the decision of the Court below), that the conversion of the real estate into personal, directed by the will, was not absolute, but partial only, for the purpose of making good the pecuniary legacies, and that such of those legacies as had lapsed, in so far as they were payable out of the produce of real estate, had lapsed for the benefit of the heir at law.

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to, between, and amongst all and every the child and children of the said *Elizabeth Parke*, born and to be born, equally share and share alike; the respective shares of the sons to be paid at twenty-one, and of the daughters at twenty-one, or marriage, which shall first happen, with benefit of survivorship between them, in the event of the death of one or more of them before such age or time as aforesaid, not only as to their respective original shares, but likewise as to all such share or shares as shall accrue to them respectively by survivorship; and if there shall be but one such child, then to such only child at such age or time as aforesaid: but in case there shall not be any child who, being a son, shall live to attain the age of twenty-one, or being a daughter, shall live to attain the age of twenty-one, or marry, then upon trust to pay the interest thereof to the before named *Lydia Amphlett* for her life, for her separate use, and after her death, upon trust for all and every her child and children born and to be born, in such manner and with such benefit of survivorship as I have herein-before directed concerning the child and children of the said *Elizabeth Parke*; and in case neither the said *Elizabeth Parke* or the said *Lydia Amphlett* shall have any child who shall live to attain such age or time as aforesaid, then upon trust, as to one moiety, for the executors or administrators of the said *Elizabeth Parke*, and as to the other moiety, to the executors or administrators of the said *Lydia Amphlett*. And I appoint the said *Nicholas Martyn* and *Roxson Parke* executors."

The value of the legacies greatly exceeded the amount of the personal estate; and several of the legatees having died in the lifetime of the testatrix, the question in the cause was, whether the words of the will operated as an absolute conversion of the real estate into personalty, so that legacies given out of the produce of that estate, and having lapsed, fell into the residue, for the benefit of the residuary

residuary legatees, or whether the conversion was partial only, so that those legacies reverted to the heir.

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The decree of the Vice-Chancellor, Sir John Leach, declared, that the legacies which lapsed by the death of the legatees in the lifetime of the testatrix, sunk into and formed part of the personal estate, and that her heir at law was not entitled to any part thereof. (a)

His Honor, having afterwards heard a second argument on the minutes, at the Rolls, adhered to the judgment he originally pronounced in favour of the residuary legatees (b); and the heir-at-law appealed from his decision.

The question was again elaborately argued on the appeal by Sir E. Sugden and Mr. Rolfe, for the heir-at-law; and by the Solicitor-General and Mr. Boteler, for the residuary legatees. The cases relied upon in the arguments are all referred to in the Lord Chancellor's judgment.

THE LORD CHANCELLOR.

Feb. 11.

This case was argued before me at great length; a circumstance which I am far from regretting, because it involves a question of very great importance in point of law, with reference to the rights of the heir-at-law as contrasted with those of residuary legatees, and with reference to a series of decisions, apparently broken in upon by one or two cases, which in the Court below have been made the foundation of the judgment now under appeal. Upon looking at the judgment of the Master

(a) 1 Sim. 275.

(b) 4 Russ. 75.

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Master of the Rolls, I find that his Honor felt considerable reluctance in deciding against the heir; and there is every reason to believe that, if he had closely examined the cases by which he held himself bound, — those of *Mallabar v. Mallabar* (a), and *Durour v. Motteux* (b), which I have had an opportunity of consulting, — the one in Mr. Coxe's valuable MSS. in *Lincoln's Inn* Library, the other in the original manuscript of Lord *Hardwicke* himself, from the collection at *Wimpole*, — he would have found the doubts confirmed which have been entertained by the profession respecting the accuracy of those cases as reported in the books; and I feel persuaded, that if his Honor had been possessed of the same materials, he would have come to the same conclusion at which I have arrived, and which, from the course of his observations, his Honor appears desirous to have reached. I have endeavoured to satisfy myself that we are not bound by those cases, when they are rightly considered and understood; and those cases alone prevented his Honor from coming to that conclusion.

This is a question arising upon a competition, as it were, between the heir at law and the residuary legatee, with respect to certain lapsed legacies. There is, first, a devise of all the real and personal estate to be sold; and all the monies arising from such sale are to be considered and taken as part of the personal estate. These, generally speaking, are strong words. The testatrix then goes on: "And I do hereby will and direct, that out of the monies to arise from such sale, and out of all other my personal estate, the several legacies herein-after mentioned shall be paid:" again considering the produce of the sale and the personal estate to be confounded

(a) *Ca. T. T.* 78.

(b) 1 *Ves. Sen.* 320.

founded in one common mass of personalty. After the general clauses of devise in trust for the payment of the legacies, we come to what must be considered, in a question like the present, to be the operative part of the will; and this, as it is that on which the residuary legatee rests his claim, requires to be accurately weighed and sifted; for it signifies little what a testator may have said in the introductory clauses, if he does not clearly maintain the same view when he comes to that part of the will which relates to the residue; that being, in effect, the title-deed under which alone the residuary legatee takes, if he can take at all. And see how important the frame of this clause is, and how remarkably the testatrix has here varied her language: "And all the residue of my personal estate;"—not stopping there, for if she had, it might have been contended that she meant to include under the phrase the monies to be produced by the sales, the fruits of which she had said were to be so considered and taken, but—"All the residue of my personal estate, and of the monies arising from the sale of my real estates." Now, monies arising from the sale of real estates are here spoken of as something not identical, but rather put in contrast with the residue of the personal estate; a most material circumstance, which pressed much upon his Honor, and one which, but for the authorities of *Mallabar v. Mallabar*, and *Darow v. Motteux*, would evidently have led him to decide in favour of the heir.

Before going further, I have to observe, with reference to the strong words, directing the sale and conversion of the lands into money, and the produce to be considered as part of the personal estate, that to be sure it is to be so considered; and in the sense which I give to the whole will, that produce is so considered; not, however, absolutely, not to all intents and purposes, but, as it were,

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secundum quid, relatively only, and severally, according to the subject matter ; part of it to go in exoneration of the incumbrances on the real estate, part in payment of the debts and legacies, and the remaining part to enure, by way of resulting trust, for the heir, as I think I shall show the rule of law to be, unless where the realty, or any part of it, has been clearly and completely taken from him.

When I say that the mere circumstance of directing that the produce of the sales shall be deemed personal estate, is not of itself sufficient to divest the heir, I am not without the authority of decided cases. In the *Countess of Bristol v. Hungerford* (a), there was a devise of real estate to executors, to be sold for payment of debts, the surplus, if any, to be deemed personal estate, — the very words here. Nevertheless, the Lord Keeper, on general principles, decreed the surplus to be a trust for the heirs-at-law ; and the decision was affirmed in the House of Lords. It is true the appeal was rather as to another part of the case ; but the circumstance of the appeal gives some security for the correctness of Mr. *Vernon's* report on this point, although his general accuracy as a reporter is not always to be relied on (b).

These words, then, are not sufficient to exclude the general rule of law ; and the question, therefore, comes to be, whether there is or is not a complete disposition, an entire conversion, out and out, of the whole into personal estate, to all intents and purposes, or only so far forth as may be necessary to satisfy the purposes of the bequests

(a) 2 *Fern.* 645.Mr. *Vernon's* report of this case(b) See 5 *P. Wms.* 194. note C., from which it appears that

is incorrect.


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bequests in the will. That is the single question. The rule is exceedingly well stated in a very learned and useful note to the report of *Cruse v. Barley*. (a) In that note Mr. Cox extracts the sound principle to be collected from all the cases, namely, that where the testator gives to the produce of real estate the quality of personalty, to all intents, and that clearly appears from the whole will, the residuary as well as the introductory clauses, there the residuary legatee shall take; but that, if he has not so done, if he has only directed the conversion for the particular purposes mentioned in the will, then, although the residue is specifically bequeathed, the rule is otherwise. The residuary legatee, by force of the term, is to take all that is residue; but to say that he takes this (the produce of real estate, in the event not otherwise disposed of) *qua* residue, is only to beg the question. I deny that it is residue here.

The general principle appears to be, that the heir must be effectually displaced, that he is not to be displaced by inference or implication, but that there must appear a clear, substantive, and undeniable intent on the part of the deviser or testator to exclude him; otherwise neither can the next of kin, as being entitled under the statute of distributions, take from the executor, nor can residuary legatees, whether they be the executors or specific legatees of the residue, take more than that which is in its nature residue, to the prejudice of the claims of the heir at law. And the executors will hold, as a resulting trust, whatever would have gone to the heir-at-law if he had not been excluded, the proof lying on the residuary legatee to displace the heir and substitute himself. Accordingly, all these cases turn, as they naturally must, upon what the particular will has done; and

(a) 3 P. Wms. 20.

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and to say that any positive rule of construction is laid down in *Mallabar v. Mallabar*, and *Durour v. Motteux*, is to speak without sufficiently considering, first, the subject-matter of the supposed rule, as extracted by Mr. Cor; and, next, the general rule of law. For the inquiry upon these rules always is, — has the heir at law, in each individual case, been sufficiently removed to let in the residuary legatee to that, which, whether it continues to be land, or whether it has been converted for a specific purpose into money, is only money till the purpose is answered or fails, and which, in the latter case, as a resulting trust, will then revert to the heir at law?

The first material case referred to upon this subject is *Cruse v. Barley* (c), which certainly furnishes no authority for contending that that doctrine has ever ceased to be law in this Court. That was a very strong instance of conversion, of dealing with the proceeds of the sale of the real estate, and confounding, as some of the cases term it, the realty and personalty together, putting them into one common fund: it is quite as strong as *Mallabar v. Mallabar*, and it was determined on great consideration. It was a devise of land to be sold, and also of personalty, and the money arising from the sale of real estate was to be divided amongst the testator's children, with 200*l.* to the heir at law at twenty-one, and "all the rest and residue thereof (that is, of the testator's personal and the produce of his real estate), among the other children when they attained the age of twenty-one years, with the benefit of survivorship among them." The case was fully argued, and very much considered; precedents were searched for, and time was taken to deliberate; and the Master of the Rolls was of opinion,
on

on the general principles of law, that the heir took, notwithstanding the conversion, after the purposes of the will had been accomplished, or in the event of any of those purposes failing.

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I say nothing of *Maugham v. Mason* (a), which goes precisely on the same principle as *Collins v. Wakeman* (b), and *Chitty v. Parker* (c), where the next of kin and the heir at law were the only litigating parties in the field. This is not a contest between next of kin and an heir at law; and it is not pretended, that if there is no specific donee, the heir at law can ever be defeated by the next of kin. That is perfectly clear. Those cases, therefore, have no application. Besides the cases of *Cruse v. Barley* and *Digby v. Legard* (d), another authority, to which, upon the argument in the Court below, the attention of his Honor was not called, and which is entitled to the greatest possible respect, is *Gibbs v. Rumsey* (e), before Sir William Grant. The words there were nearly the same as those which occur in *Green v. Jackson* (g), of which I shall say a word hereafter. "Such part of the real estate," says Sir William Grant in *Gibbs v. Rumsey*, "as is given to charitable purposes (and which is void under the statute of mortmain) belongs to the heir at law, and does not go either to the next of kin, or the residuary legatee."

The question, then, comes to be, with respect to those two excepted cases of *Mallabar v. Mallabar* (h) and *Durrow v. Motteux* (i), by which his Honor, the Master of the Rolls, appears to have thought himself bound. Upon looking

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| (a) 1 Ves. & B. 410. | (e) 2 Ves. & B. 294. |
| (b) 2 Ves. jun. 683. | (g) 5 Russ. 35. p. 238. <i>infra</i> . |
| (c) 2 Ves. jun. 271. | (h) Ca. T. T. 78. |
| (d) 3 P. Wms. 22. Cox's note, | (i) 1 Ves. sen. 320. |
| 2 Dick. 500. | |

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looking into *Mallabar v. Mallebar*, I find that one great argument, which was urged on both sides, and to which the attention of the Court appears to have been principally directed, was a pretension of a monstrous nature, viz., that to discover what was the legal meaning of certain phrases in that will, parol evidence was to be let in,—evidence of the intention of the testator, as stated by him in conversations with the witnesses in whose presence he made his will. Lord *Talbot*, it is to be observed, admitted that evidence. In *Forrester's* report his Lordship is made to say, “If this was *res integra*, and I was at liberty to follow my own opinion, I should be very unwilling to admit such evidence; but as it has been done, and particularly in the case of *Dorey v. Dorey* and *Littlebury v. Buckley* (a), I now admit it to be done.” Then was read a deposition of a witness, who gave full evidence of the testator’s declaration that the plaintiff, after payment of his debts and legacies, should have all the rest of his estate.” How this could ever be admissible evidence it appears impossible to discover, but it may have influenced the decision of the learned Judge; although the reporter adds, “The Lord Chancellor decreed upon the will itself, independently of the parol evidence, that there was no resulting trust for the heir, and that the executrix should have the whole residue, after the sale of the estate, both of the money arising by such sale and of the personal estate.” I have looked into Mr. Carr’s notes in *Lincoln’s Inn* Library, where I find a much more full and accurate account of that case; and it turns out that there was a very material circumstance, which was shortly alluded to at the bar, and which is not to be lost sight of,—there was a legacy of 500*l.* expressly given out.

(a) Cited 2 *Vern.* 677.

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out of the fund to the heir at law. (a) That legacy, Mr. *Fazakerly* argued, was a most important bequest, as raising an implied presumption against the heir, especially when coupled with the fact of the testator's leaving to his sister scarcely any thing but a burthen, unless, upon the general scope and effect of the will, she was to take beneficially in her character of residuary legatee; and he relied on the way in which the particulars of the property, the lands, the houses, the tithes, the rent-charges, and the various provisions respecting them, were minutely recited and detailed, as proving that the testator, at the time, had the whole of his property in his eye. All these different particulars the testator carefully enumerates; he directs them to be converted into personalty, and put into one fund, and out of that fund the legacy to be paid to the heir; and he then goes on to mention his sister, the residuary legatee, as the special object of his bounty. Taking all these circumstances together, the Court may very possibly have held that there was enough, on the face of the instrument, to establish a clear intention to displace the heir at law; for Lord *Talbot* says, — "The testator intended that the whole of the real estate should be turned into money; and the question was, whether the monies arising from the estate sold should go to the heir at law." He then observes on the fact of the 500*l.* legacy, and adopts Mr. *Fazakerly's* argument to its fullest extent, making it, in a great measure, the ground of his decision. That gives a very great specialty to the case; and though I am not to reconcile it with *Cruse v. Barclay*, there is still enough to differ it from that case, with which, possibly, it may stand, and enough to shew it was decided on the apparent intention to displace the heir, in accordance with the rule which I have stated to be

(a) This legacy is mentioned in Mr. *Forrester's* report.

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be extracted from all the cases, that you must clearly prove that the heir at law is excluded; that the words prevent the possibility of considering any thing to be left as a resulting trust for him; and that the burthen of such proof lies upon those who claim in opposition to him.

It is not at all inconsistent with that rule, but rather flows from it, and I agree in holding, that a testator may provide, not only that the undisposed residue, which is strictly personal, shall go to the residuary legatee, but that all lapsed legacies, of whatever nature, shall also go to him; and that, if it is clear, therefore, from express words, that he gave him the lapsed legacies that were to be raised by the sale of real property, and failed in consequence of lapse, mortmain, or any other cause;—if he says, for instance, “I give all the lapsed legacies as parcel of my residue to the residuary legatee,” *cadit quæstio*, there is no doubt he may; and if he can do it by express words, he can do it by plain and obvious intention, to be gathered from the whole instrument.

If you once arrive at the conclusion that the testator has displaced the heir, then, of course, the lapsed fund falls into the residue by express intention: and so I take to have been the feeling of Lord Hardwicke, from what I see of his judgment in the case of *Durour v. Mottour*. On comparing the statement of the will in that case as set out in Messrs. Simons and Stuart's Reports (a), with the very incorrect and slovenly note of it in *Vesey*, it is perfectly clear that the will was so framed as to make that an exceedingly probable intention; as Lord Hardwicke at once perceived. The testator enumerates very minutely

(a) 1 Sim. & Stu. 292. note.

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minutely his whole property, leaseholds, freeholds, money, securities, bonds, stock both at home and abroad, plate and linen, and all he had or might have any claim to, of what kind soever, and so forth, and directs that the residue, being personalty, should be invested in government or other securities in the names of his trustees, on trust, and that the whole produce, be it what it may, should go to the last survivor for life (for he gave it out in life interests only); and to pay the residue and the principal unto and among the respective children and so forth; and the remainder of his estate being placed out at interest in some of the funds, then he directs it to be dealt with in like manner. Now, undoubtedly, from this it might be more easy to collect the intention, than from the short note in *Vesey*, and to contend it was the express design of the testator to give the whole, whatever it might amount to, and whether consisting of such parts of his property as were previously undisposed of, or of surplus produced by the sale of real estate, as to which his purpose failed in consequence of mortmain or otherwise, to those persons who are the particular objects of his bounty.

On looking further into the case, however, you will find that this, though the only point in the cause which bears upon the present question, was not much discussed at the bar, and certainly not much considered by the Judge. The great contention there was, whether a certain gift, said to be mortmain, was mortmain or not. The argument turned mainly upon that; and although Lord *Hardwicke's* manuscript book, now lying before me, contains an entry making some reference to the conflicting claims of the heir at law and residuary legatee, and gives the substance of the argument of counsel, yet when his Lordship comes to deliver his own judgment, he directs it entirely to the question of mortmain,

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as if that were almost the only subject to which his attention was particularly called. So that it happens here, as it often happens in cases of importance, that where one point in a cause is of main consideration, and another comes in only by the by, after the former has engrossed the attention of the Court, it is at once assumed, and slurred over and disposed of hastily. The question of mortmain appears to have been argued with great learning, and was strongly present to his Lordship's mind; and, indeed, all he says respecting the other point is, "I hold the bequest of 1200*l.* to be, under the mortmain act, void," and then he states one or two grounds on which he so held it, "and, therefore," he concludes, "it shall fall into the residue of the testator's estate, and be divided according to his will." Now really I do not at all deny that: I agree that it falls into the residue of the testator's estate, and should be divided according to his will. This would leave it quite in doubt whether Lord *Hardwicke* meant the heir at law to take the residue: but on examining the registrar's book, it appears that the decree was drawn up as if the residuary legatee, and not the heir, took it. The report in *Vesey* (a) cannot be correct. Lord *Hardwicke* is there represented as saying that the cases on the subject differed, but the last determination he believed was in favour of the heir at law. Now that is not the way in which a learned and accomplished lawyer like Lord *Hardwicke* would have treated so grave a question; it is precisely the way in which an unlettered and ignorant man would have spoken. Lord *Hardwicke* knew well that it was in *Arnold v. Chapman* (b) he had previously decided in favour of the heir; and it is impossible to conceive that his Lordship, who but a year and a half before had determined that case upon great

(a) 1 *Ves.* sen. 320.(b) 1 *Ves.* sen. 108.

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great consideration, and who had then thoroughly discussed the question, and distinctly laid down the legal doctrine, should have decided as he is here represented to have done, if his attention had been sufficiently drawn to the point; least of all, is it conceivable that he should have treated the decision in *Arnold v. Chapman* as a mere chance *dictum*, as if that capriciously gave it to the heir, and now it was the turn of the residuary legatee. In *Arnold v. Chapman* copyhold estate was given to *A.* on condition that he should pay 1000*l.* to the executors upon trust for a charity. This his Lordship held clearly to be a shift to evade the mortmain act, and therefore not to be allowed. His words are, — “The heir at law then is entitled by way of resulting trust, because this 1000*l.* is mentioned by way of condition on the devise of the real estate, and is to be paid to the executors; and to be sure if wanted for debts it would vest, and must be admitted by the executors, for that purpose only, to be turned into personal estate. But the act has prevented this transmutation for the benefit of the hospital, and then it remains part of the real, undisposed by the will; for the executors take it only as trustees, and any part or profits of the real estate undisposed will be a resulting trust for the heir.”

Last of all comes the case of *Green v. Jackson*(*a*), where his Honour decided as he had previously done in the present case, and relied upon the same authorities. In *Green v. Jackson* all the property is marked with the most minute and specific enumeration, to be laid out and formed into a particular fund. And how does the testator deal with that fund? It is to be formed at a certain time, under certain circumstances, and vested in the

(*a*) 5 *Russ.* 55. p. 238. *infra*.

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the executors for certain purposes:—"And I do direct that my said trustees, &c. shall pay and apply all the residue of the monies which shall then be in their hands unto and among all the children," &c. that is, the residuary legatees.—His Honor held there, on the peculiar language of the instrument and the authority of *Durour v. Motteur*, that there was an express intention to give the whole, from whatever source arising, whether from lapse or otherwise,—all the money then in their hands, after particularly describing and specifying how it was to come into their hands, and how and for what purposes they were to keep it,—among the children, the residuary legatees. *Green v. Jackson*, therefore, does not appear to be at all in discrepancy with the other cases professing to be founded on *Durour v. Motteur*.

A good deal was said of *Ackroyd v. Smithson* (a), chiefly on account of Lord Eldon's most able argument in that case: but the case has, in fact, no application; for the contest there lay, not as here, between the heir and residuary legatees, as might at first be supposed, but between the heir and the next of kin, each claiming, as undisposed of, a lapsed share of residue, the produce of real estates directed to be sold. As to that there can be no doubt; for it is admitted on all hands, that unless the next of kin is made a specific donee he never can stand in competition with the heir at law. With respect to the case of *Kennell v. Abbott* (b) before Lord Alvanley, a Judge whose deservedly high authority pressed me very strongly, I can only say that he appears there to have proceeded on the common understanding of *Durour v. Motteur*, a case which, from the circumstances already mentioned, seems to have been generally misconceived.

In

(a) 1 Bro. C. C. 503.

(b) 4 Ves. 802.

In reversing the judgment of the Master of the Rolls, it is a great satisfaction to me to find that his Honour plainly intimated his own opinion to be against the decision to which, on the authority of the cases, he thought himself bound to come. I have endeavoured to shew that the effect of those cases has not been correctly understood, and that they are not binding upon the Court; but it is so anxious and alarming a matter to be called upon to depart from what a Judge like Lord *Alvanley* seems to have considered as settled by authority, that I have deemed it necessary to state my reasons at large, which must be my apology for having taken up so much of the public time.

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A petition of appeal was presented to the House of Lords against this decision; but the appeal was compromised before it came to a hearing, the heir and the residuary legatee dividing the fund between them. (a)

(a) See *Phillips v. Phillips*, 1 *Mylne & Keen*, 653. 660.

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April 27.

1835.

Jan. 15.

April 1.

Where a testator directed his real and personal estate to be sold, and his debts and legacies to be thereout paid, including certain charitable legacies, and gave the residue of the mixed fund to *A.* and *B.*, the failure of the charitable legacies was held to enure to the benefit of *A.* and *B.*

Affirmed on appeal.

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THE will of *Joseph Chapman*, upon which the question in the cause arose, is stated by Mr. *Russell* in his report of the case upon the hearing at the Rolls. (a) The property comprised in the bequests, which failed in consequence of the operation of the mortmain act, consisted partly of freehold and partly of leasehold estate.

The MASTER of the ROLLS having decided that the failure of the charitable legacies given by the will enured to the benefit of the persons described in the residuary gift, the heir-at-law and some of the next of kin of the testator joined in presenting a petition of appeal against his Honor's decision.

This petition came on to be heard before Lord Chancellor *Brougham* in April 1831, when the appeal was fully argued, by Mr. *Agar*, Mr. *Preston*, and Mr. *Duckworth*, on behalf of the heir-at-law; by Mr. *Lynch*, on behalf of the next of kin; and by the Solicitor-General, (Sir *W. Horne*) and Sir *Edward Sugden*, on behalf of the residuary legatees. In the course of the discussion considerable reference was made to the decision of his Lordship in the recent case of *Amphlett v. Parke* (b), which, while it was strenuously represented on the one side, and as strenuously denied on the other, to have a direct and conclusive bearing on the question before the Court, was stated to be likely in the course of a very short period to be brought under the review of the House of Lords,

(a) 5 Russ. 35.

(b) p. 221. *suprà*.

Lords, in conformity with his Lordship's suggestion. When the counsel for the respondents had concluded their argument, the Lord Chancellor said that, having regard to his decision in *Amphlett v. Parke*, and to the peculiar situation in which that case stood, he was disposed to postpone his decision in *Green v. Jackson* until the judgment of the House of Lords upon the pending appeal in *Amphlett v. Parke* should be pronounced.

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Circumstances subsequently occurred which induced the parties in the cause of *Amphlett v. Parke* to come to a compromise of their conflicting claims; the appeal to the House of Lords in that case was abandoned (a); and Lord Brougham having resigned the Great Seal before any arrangement could be made for having the appeal in *Green v. Jackson* reheard and finally disposed of, that appeal was now set down, upon a special application, to be re-argued before his successor, Lord Lyndhurst.

Mr. Agar, Mr. Preston, and Mr. Duckworth, for the appeal.

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Jan. 15.

This case is distinguishable from those in which the decision in favour of the residuary legatee rested on the ground that the real estate was converted out and out as from the moment of the testator's death, and therefore applicable as personal estate to every purpose specified in the will. The doctrine of conversion out and out is not very intelligible in itself, and is certainly repugnant to the acknowledged rule of law that the rights of a testator's heir shall not be defeated by any thing short of a manifest and declared intent. If that rule be rigidly applied, it would necessarily follow that the heir is entitled

a) See 1 *Mylne & Keen*, 653. 660.

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titled not only to such real estate as has not in express terms been devised away from him to other objects, but also, by way of resulting trust, to such real estate as by the failure of those objects in consequence of lapse or the mortmain act is not eventually required for effectuating the purposes of the will. To give to a mere general residuary bequest, which might, as against next of kin, carry the lapsed personal estate, the same effect, through the doctrine of conversion out and out, as against real estate or its produce, to the exclusion of the heir-at-law, is contrary to principle and analogy; and although the doctrine derives some countenance from the earlier cases of *Mallabar v. Mallabar* (a) and *Durour v. Motteux* (b), and one or two others which like *Kennell v. Abbott* (c) proceeded upon *Durour v. Motteux*, the whole current of modern authorities has run the other way, and has tended to restore the sounder doctrine that the conversion, though complete in altering the quality of the property, is altogether inoperative in affecting the rights of the heir, to whom the converted real estate, not being expressly disposed of, is held to revert, but to revert in the character of personalty. That doctrine is distinctly laid down by Sir *W. Grant* in *Gibbs v. Rumsey* (d), and it was lately adhered to in *Amphlett v. Parke* (e), after much consideration, by Lord *Brougham*, who, in a very elaborate judgment, in which he overruled the decision of the late Master of the Rolls, took a review of all the leading authorities on the subject, and particularly *Mallabar v. Mallabar* and *Durour v. Motteux*, and came to the conclusion that those two cases had been misconceived, and that they did not, when closely examined, bear out the general proposition they

(a) *Ca. T. T.* 78.(b) 1 *Ves.* sen. 320.(c) 4 *Ves.* 802.(d) 2 *Ves. & B.* 294.(e) p. 221. *suprà*.

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they had long been supposed to establish. In *Amphlett v. Parke* a petition of appeal was afterwards presented to the House of Lords, in compliance with a suggestion of Lord Brougham himself; but that appeal was ultimately abandoned, so that his Lordship's judgment stands unimpeached, and must now be considered as a binding authority. That the decision in *Amphlett v. Parke* has a direct and powerful bearing on the present case, is manifest from the fact that Lord Brougham declined to decide the latter till the expected judgment of the Court of last resort had been pronounced in *Amphlett v. Parke*. The frame of the will there, indeed, was much stronger in favour of the residuary legatee than in the case with which the Court has now to deal; for the proceeds of the testator's real and personal estate were thrown into a common fund, and blended in such a way that except in imagination it was impossible to sever them. The judgment of Lord Brougham is supported by the authority of *Cruse v. Barley* (a), *Arnold v. Chapman* (b), *Attorney-General v. Johnstone* (c), *Gravenor v. Hattum* (d), *Collins v. Wakeman* (e), and *Jones v. Mitchell* (g); and it is strictly in accordance with the principles laid down by Mr. Justice Buller in *Hutcheson v. Hammond* (h), by the late Master of the Rolls in *Jessopp v. Watson* (i), and by Sir W. Grant in *Gibbs v. Rumsey* (k), a case which it is impossible to distinguish from the one before the Court. *Durour v. Motteux* therefore may now be considered as overruled; or if not directly overruled, as no longer an authority, except in cases where the language of the instrument is identically the same.

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(a) 3 P. Wms. 20.

(b) 1 Ves. sen. 108.

(c) Amb. 577.

(d) Amb. 643.

(e) 2 Ves. jun 693.

(g) 1 S. & Stu. 290.

(h) 3 Bro. C. C. 128.

(i) 1 Mylne & Keen, 665.

(k) 2 V. & B. 294.

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It is unnecessary however to rest this appeal upon the authority of *Amphlett v. Parke* as overruling *Durour v. Motteur*; for not only is the language by which the supposed conversion is effected infinitely less strong here than in either of those cases; but there is also a peculiarity here which is not to be found in them; the alleged residuary bequest is the gift only of a special, and not of a general residue. In this view it is that such of the appellants as are the testator's next of kin contend they are entitled to the produce of the leasehold estates ineffectually given to charitable uses. The bequest is, of "all the residue of the monies which shall then be in their hands, *after full satisfaction and discharge of the aforesaid several payments and bequests,*" among the children of the testator's nephews and nieces. The children of the nephews and nieces are only to take the clear surplus after all those specified purposes have been fully satisfied. This, then, is the gift of a residue with an exception; and the excepted part not being otherwise disposed of, goes, so far as it consists of real estate, to the heir, and so far as it consists of personal estate, to the next of kin. *Davers v. Dewes* (a), *Attorney-General v. Johnstone* (b), *Skrymsher v. Northcote* (c), *Page v. Leapingwell* (d), *Baker v. Hall.* (e)

Sir *W. Horne* and Mr. *Rudall*, for the residuary legatees, contended that the Lord Chancellor's judgment in *Amphlett v. Parke*, was not inconsistent with that of the late Master of the Rolls in the case under appeal; nor had it been so considered by Lord *Brougham*; but they submitted, that even if such inconsistency existed, still *Amphlett v. Parke* could hardly be considered

(a) 3 *P. Wms.* 40.(b) *Amb.* 577.(c) 1 *Swans.* 566.(d) 18 *Ves.* 463.(e) 12 *Ves.* 497.

sidered as of great authority, inasmuch as the heir-at-law, rather than have the judgment carried to the House of Lords, had been glad to effect a compromise of his claims on very reasonable terms. The Lord Chancellor's judgment, besides, was directly opposed, not only to *Mallabar v. Mallabar* and *Durour v. Motteur*, but to a series of subsequent decisions which were supposed to have settled the law upon the subject. *Ogle v. Cook* (a), *Kennell v. Abbott* (b), *Noel v. Lord Henley*. (c) That the late Master of the Rolls had not been satisfied with the final determination in *Amphlett v. Parke*, was clear from the language of his judgment in *Phillips v. Phillips*. (d) The argument, that the residuary bequest was not a general, but a special one, was founded entirely in mistake. There could be no such thing as a residue of a residue. A residuary bequest, of necessity, carried every thing not effectually given to other objects, provided the lapsed fund were personal in its nature, or what was substantially the same thing, and was the case in the present instance, had the character of personalty irrevocably impressed on it by the language of the testator himself. The cases cited in support of the position, that there might be a special residue, turned upon the very peculiar wording of the wills in those cases; the gift, though in form apparently residuary, would be found on examination to be really specific. But the Court had always been reluctant to admit an exception to the general rule; *Cambridge v. Rous* (e), *Bland v. Lamb* (g); and here the residuary clause furnished no ground for it whatever; for that merely expressed what every bequest of a residue implied, that what remained, after fully satisfying the purposes previously specified, should be the only fund applicable for the benefit of the residuary legatees.

Mr.

(a) 1 Bro. C. C. 513.

(b) 4 Ves. 802.

(c) 7 Price, 241.

(d) 1 Mylne & Keen, 662.

(e) 8 Ves. 12.

(g) 2 J. & W. 392.

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1835.

April 1.

Mr. *Hovenden* and Mr. *J. Russell* appeared for other parties.

The LORD CHANCELLOR.*

This was an appeal from the judgment of the late Master of the Rolls. *Joseph Chapman* being possessed of considerable property, both real and personal, by his will directed that his real and personal property should be sold and converted into money, and that the produce should be lodged at interest in one of the banking houses at *Hull*. He directed certain legacies to be paid, and, among others, some for charitable purposes, which, as far as they were payable out of real estate, are admitted to be void. The question is, whether that part of the testator's property fell into the residue, or belongs to the heir-at-law.

The testator, in two several parts of his will, speaking of the mixed fund, calls it the residue of his personalty. He directs his property to be converted into money, which is not to be applied to the ultimate object of the trust until the death of his wife; but is, in the meantime, to remain at interest in the hands of a banker at *Hull*. Having upon two occasions called the mixed fund "the residue of his personalty," he directs his executors, upon the death of his wife, to pay and apply the residue of the monies which should be in their hands, after satisfying the previous dispositions contained in his will, unto and among the persons whom he proceeds to mention as his residuary legatees.

Taking the whole will together, I am clearly of opinion that the testator intended to treat the mixed fund,

* Lord *Lyndhurst*.

fund, composed of the produce of his real and personal estate, as personalty. I agree entirely with the late Master of the Rolls, in thinking that the case of *Durour v. Motteux* is directly in point with the present case; and as Lord *Hardwicke's* decision in *Durour v. Motteux* has never been over-ruled, but, on the contrary, has in more than one instance been recognised, I feel myself bound to act upon the authority of that case. It was said that *Durour v. Motteux* was over-ruled by the decision pronounced by Lord *Brougham* in *Amphlett v. Parke*; but I have seen an accurate note of his judgment in *Amphlett v. Parke*, and it appears to me that Lord *Brougham* had no intention of over-ruling *Durour v. Motteux* by his decision in that case. On the contrary, he expressly distinguishes *Amphlett v. Parke* from *Durour v. Motteux*, and from the present case of *Green v. Jackson*, which had been decided by the Master of the Rolls before Lord *Brougham* pronounced the judgment over-ruling the same Judge's decision in *Amphlett v. Parke*.

1891.

 GREEN
 v.
 JACKSON.

It was supposed in the argument of the present case, that Lord *Brougham* considered the cases of *Amphlett v. Parke* and *Green v. Jackson* to be alike, and that the decision in the one must govern the decision in the other; but when I come to advert to the language used by Lord *Brougham* in his judgment in *Amphlett v. Parke*, I find that so far from his having been of that opinion, he appears to have said directly the reverse. Lord *Brougham* says, "In *Green v. Jackson*, all the property is marked with the most minute and specific enumeration, to be laid out and formed into a particular fund. And how does the testator deal with that fund? It is to be formed at a certain time, under certain circumstances, and vested in the executors for certain purposes.—' And I do direct that my said trustees shall pay and apply all the
 residue

1831

GREEN

1831.

April 27.

1835.

Jan. 15.

April 1.

Where a testator directed his real and personal estate to be sold, and his debts and legacies to be thereout paid, including certain charitable legacies, and gave the residue of the mixed fund to *A.* and *B.*, the failure of the charitable legacies was held to enure to the benefit of *A.* and *B.*

Affirmed on appeal.

GREEN v. JACKSON.

THE will of *Joseph Chapman*, upon which the question in the cause arose, is stated by *Mr. Russell* in his report of the case upon the hearing at the Rolls. (a) The property comprised in the bequests, which failed in consequence of the operation of the mortmain act, consisted partly of freehold and partly of leasehold estate.

The MASTER of the ROLLS having decided that the failure of the charitable legacies given by the will enured to the benefit of the persons described in the residuary gift, the heir-at-law and some of the next of kin of the testator joined in presenting a petition of appeal against his Honor's decision.

This petition came on to be heard before Lord Chancellor *Brougham* in April 1831, when the appeal was fully argued, by *Mr. Agar*, *Mr. Preston*, and *Mr. Duckworth*, on behalf of the heir-at-law; by *Mr. Lynch*, on behalf of the next of kin; and by the Solicitor-General, (*Sir W. Horne*) and *Sir Edward Sugden*, on behalf of the residuary legatees. In the course of the discussion considerable reference was made to the decision of his Lordship in the recent case of *Amphlett v. Parke* (b), which, while it was strenuously represented on the one side, and as strenuously denied on the other, to have a direct and conclusive bearing on the question before the Court, was stated to be likely in the course of a very short period to be brought under the review of the House

Lord

(a) 5 Russ. 35.

(b) p. 221. *supra*.

Lords, in conformity with his Lordship's suggestion. When the counsel for the respondents had concluded their argument, the Lord Chancellor said that, having regard to his decision in *Amphlett v. Parke*, and to the peculiar situation in which that case stood, he was disposed to postpone his decision in *Green v. Jackson* until the judgment of the House of Lords upon the pending appeal in *Amphlett v. Parke* should be pronounced.

1851.
GREEN
v.
JACKSON.

Circumstances subsequently occurred which induced the parties in the cause of *Amphlett v. Parke* to come to a compromise of their conflicting claims; the appeal to the House of Lords in that case was abandoned (a); and Lord Brougham having resigned the Great Seal before any arrangement could be made for having the appeal in *Green v. Jackson* reheard and finally disposed of, that appeal was now set down, upon a special application, to be re-argued before his successor, Lord Lyndhurst.

Mr. Agar, Mr. Preston, and Mr. Duckworth, for the appeal.

1855.
Jan. 15.

This case is distinguishable from those in which the decision in favour of the residuary legatee rested on the ground that the real estate was converted out and out as from the moment of the testator's death, and therefore applicable as personal estate to every purpose specified in the will. The doctrine of conversion out and out is not very intelligible in itself, and is certainly repugnant to the acknowledged rule of law that the rights of a testator's heir shall not be defeated by any thing short of a manifest and declared intent. If that rule be rigidly applied, it would necessarily follow that the heir is entitled

a) See 1 *Mylne & Keen*, 53. 660.

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1831.
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1831
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1831.

GREEN

v.

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1835.

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Mr. Hovenden and Mr. J. Russell appeared for other parties.

The LORD CHANCELLOR.*

This was an appeal from the judgment of the late Master of the Rolls. *Joseph Chapman* being possessed of considerable property, both real and personal, by his will directed that his real and personal property should be sold and converted into money, and that the produce should be lodged at interest in one of the banking houses at *Hull*. He directed certain legacies to be paid, and, among others, some for charitable purposes, which, as far as they were payable out of real estate, are admitted to be void. The question is, whether that part of the testator's property fell into the residue, or belongs to the heir-at-law.

The testator, in two several parts of his will, speaking of the mixed fund, calls it the residue of his personalty. He directs his property to be converted into money, which is not to be applied to the ultimate object of the trust until the death of his wife; but is, in the meantime, to remain at interest in the hands of a banker at *Hull*. Having upon two occasions called the mixed fund "the residue of his personalty," he directs his executors, upon the death of his wife, to pay and apply the residue of the monies which should be in their hands after satisfying the previous dispositions contained in his will, unto and among the persons whom he proceeds to mention as his residuary legatees.

Taking the whole will together, I am clearly of opinion that the testator intended to treat the mixed fund,

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and, composed of the produce of his real and personal estate, as personalty. I agree entirely with the late Master of the Rolls, in thinking that the case of *Durour v. Motteux* is directly in point with the present case; and as Lord *Hardwicke's* decision in *Durour v. Motteux* has never been over-ruled, but, on the contrary, has in more than one instance been recognised, I feel myself bound to act upon the authority of that case. It was said that *Durour v. Motteux* was over-ruled by the decision pronounced by Lord *Brougham* in *Amphlett v. Parke*; but I have seen an accurate note of his judgment in *Amphlett v. Parke*, and it appears to me that Lord *Brougham* had no intention of over-ruling *Durour v. Motteux* by his decision in that case. On the contrary, he expressly distinguishes *Amphlett v. Parke* from *Durour v. Motteux*, and from the present case of *Green v. Jackson*, which had been decided by the Master of the Rolls before Lord *Brougham* pronounced the judgment over-ruling the same Judge's decision in *Amphlett v. Parke*.

1881.

GREEN

v.

JACKSON.

It was supposed in the argument of the present case, that Lord *Brougham* considered the cases of *Amphlett v. Parke* and *Green v. Jackson* to be alike, and that the decision in the one must govern the decision in the other; but when I come to advert to the language used by Lord *Brougham* in his judgment in *Amphlett v. Parke*, and that so far from his having been of that opinion, he appears to have said directly the reverse. Lord *Brougham* says, "In *Green v. Jackson*, all the property is marked with the most minute and specific enumeration, to be laid out and formed into a particular fund. And how does the testator deal with that fund? It is to be formed at a certain time, under certain circumstances, and vested in the executors for certain purposes.—' And I do direct that my said trustees shall pay and apply all the residue

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JACKSON.

residue of the monies which shall then be in their hands, unto and among all the children,'—that is the residuary legatees. His Honor held there on the peculiar language of the instrument and the authority of *Durour v. Motteux*, that there was an express intention to give the whole, from whatever source arising, whether from lapse or otherwise,—all the money then in their hands, after particularly describing and specifying how it was to come into their hands, and how and for what purposes they were to keep it,—among the children, the residuary legatees. *Green v. Jackson*, therefore, does not appear to be at all in discrepancy with the other cases professing to be founded on *Durour v. Motteux*." It would seem, therefore, that Lord *Brougham* did not consider that his judgment in *Amphlett v. Parke*, over-ruling the decision of the late Master of the Rolls, was at all at variance with the same Judge's decision in *Green v. Jackson*, or that his own decision upon the appeal from the judgment of the Master of the Rolls in *Green v. Jackson*, would necessarily have been determined, as has been supposed, by the decision of the House of Lords in *Amphlett v. Parke*, had that case, instead of being compromised, been brought to a hearing.

Without reference, however, to the case of *Amphlett v. Parke*, I am of opinion that the present case falls directly within the principle upon which Lord *Hardwicke* decided the case of *Durour v. Motteux*, and I feel myself bound by the authority of that decision. The judgment of the Master of the Rolls, therefore, must be affirmed.

1831

FRADELLA v. WELLER.

ROLLS.
Jan. 31.

[N the summer of 1828, the Plaintiff, having ascertained that three pirated copies, made in *France*, of an engraving, of which he had the copyright, had been sold by the Defendant, filed his bill and obtained an injunction *ex parte*.

The Defendant, by his answer, stated that he bought at a shop in *London*, which he named, some engravings; that among these were the three engravings complained of, which purported to have been engraved at *Paris*; that he paid 16s. for them; that, neither when he bought them nor when he sold them, had he any suspicion or notion that they were piracies, and if he had been aware of their being so, he would not have had any thing to do with them; that he had not sold any copies of the engraving in question, except these three; and that no notice of any complaint against his conduct was given to him before the filing of the bill.

After the injunction had been obtained, the Plaintiff had expressed his willingness to proceed no further in the suit, if the costs were paid. The Defendant, though willing to submit to the injunction, refused to pay the costs; but took no steps to put in his answer till compelled, or to dissolve the injunction, or to dismiss the bill for want of prosecution.

The Plaintiff, having proceeded with the suit, obtained a decree *nisi* by default; and the cause now came

In a suit to restrain the sale of pirated copies of a print, where the answer did not suggest that the prints complained of were not pirated copies, a decree was made, under the particular circumstances, though the prints, which had been exhibited to the witness who proved the offence, were not produced at the hearing.

Where the Plaintiff is entitled to have the injunction made perpetual, the Defendant will have to pay the costs of the suit, however trivial the subject matter of the suit may be, if he did not, after the injunction was granted, tender the costs up to that time.

1831.

FRADELLA

v.

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on to be heard on shewing cause against making the decree absolute.

A witness proved that the Defendant had sold three engravings, which were produced to the witness, and were referred to in his deposition as exhibits; and that these three engravings were piracies of a print, also an exhibit, which was the Plaintiff's engraving. But all the prints, which had been made exhibits, had been stolen since the former hearing, and none of them were now produced.

Mr. *Pemberton* and Mr. *Keene*, for the Plaintiff, were willing to waive the account, but insisted on their right to have a decree with costs against the Defendant.

Mr. *Bickersteth* and Mr. *O. Anderdon*, for the Defendant.

As the engravings referred to in the depositions are not produced, there is no evidence that the engravings sold by the Defendant were piracies of the Plaintiff's print. Neither is there any evidence of the title of the Plaintiff; for if the engraving, of which he claims the copyright, had been produced, it might have been found that the date of the publication and the name of the proprietors did not appear upon it. Besides, the injury alleged to have been sustained by the Plaintiff is so trivial, and the sum in question is so small, that the matter is below the dignity of the Court. The only copies of the alleged piracy, which have been sold by the Defendant, are the three which the Plaintiff's agent purchased; and the whole three were worth only about 16s. At all events, the Plaintiff ought to have been satisfied with retaining his injunction undisturbed; and the Court ought not to encourage the oppression of bringing such a cause to a hearing.

The


The MASTER of the ROLLS.

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The first question is, whether the Defendant has been proved to have been guilty of pirating the Plaintiff's print. A witness, whose evidence is unopposed, swears that three prints were sold by the Defendant, which, on comparison with the original print belonging to the Plaintiff, were, he says, clearly pirated. There is no suggestion in the answer that the engravings complained of were not piracies. But, these engravings having been lost or stolen since the examination of the witness, it is said that, when prints are complained of as piracies, it is usual to exhibit to the Court the original and the alleged piracy, and, as that has not been done here, there is no means of judging whether the Plaintiff's rights have been invaded. And no doubt it is usual to produce the prints, and the Court may, on the inspection of them, form its opinion; but it is not necessary to produce them, and the Court may decide without inspection. Here it was not made a question in the cause, whether the engravings, of which the bill complained, were piracies of the Plaintiff's print; and, the testimony of the witness being unopposed, there is sufficient evidence to charge the Defendant with the offence.

It is next said, that the injury complained of is of so small an amount, that costs ought not to be awarded to a Plaintiff who prosecutes such a suit to a hearing. I admit that it would not have been fit for the Plaintiff to have prosecuted this suit, if the Defendant had tendered to him the costs occasioned by his wrong-doing, and by the steps which that wrong-doing had caused the Plaintiff to take for his protection. But the Defendant did not tender the costs; he must, therefore, be charged with costs. It is not reasonable that a party, whose copyright has been pirated, should

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sustain the further injury of having to bear the costs of obtaining protection.

Let the injunction be made perpetual; let the Plaintiff, if he chooses, have an account; and let the Defendant pay the costs of the suit.

The Plaintiff waived the account.

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Jan.

Feb. 7. 25.

JOHN WEALL, in contemplation of the intended marriage of his daughter *Ann* with the Defendant *Henry Rice*, executed articles of agreement, dated the 4th of *September* 1816, which were in the words following: —

“ Whereas a marriage being about to take place between my daughter *Ann Weall*, and Mr. *Henry Rice* of *Jermyn Street, St. James's*, it was agreed that I should advance 3000*l.* as a marriage portion, to be settled on my daughter and Mr. *Rice*, and their issue; but being desirous of making a more advantageous arrangement and provision for my daughter and her intended husband and their issue by the said marriage, by settling some

If a father makes a provision for a child by settlement on her marriage, and afterwards makes a provision for the same child by his will, it is *prima facie* to be presumed that he does not mean a double provision.

But this presumption may be repelled or fortified by intrinsic evidence from

the nature of the two provisions, or by extrinsic evidence of the intention of the testator at the time of making his will.

Slight differences between the two provisions will not repel the presumption against double provisions.

Slight differences are such as, in the opinion of the Judge, leave the two provisions substantially of the same nature.

Declarations of the parent referring to his intention at the time of making his will, whether made at the time or before or after, are admissible evidence to prove that he did not mean to give a double provision.

A paper written sometime after the date of his will, and shewing the state of his property, but having no reference to his intention, is not admissible for that purpose.

A father, by articles made previous to the marriage of his daughter, agreed to settle, either by deed or will, lands of the value of 3000*l.*, in trust for his daughter for life, to her separate use, remainder to the husband for life, remainder to the children of the marriage as tenants in common in tail, with cross remainders. By his will he devised a real estate worth more than 3000*l.*, in trust for his daughter for life to her separate use, but without the power of anticipation or alienation; remainder to the husband for life, he maintaining and educating the children of the marriage; remainder to the children of the marriage as tenants in common in fee; with a limitation over of the shares of those, who should die under twenty-five without leaving issue, to the survivors: Held, that the differences between the two provisions were not such as to repel the presumption against double portions, and that the daughter, her husband, and children, were not entitled both to the benefits given by the will and to the provisions stipulated for by the articles.

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part of my estates in the county of *Middlesex*, or some other freehold or copyhold estate to be hereafter purchased by me, to the use or in trust for my daughter for life, independent of her husband; and after her decease, to the use of or in trust for Mr. *Rice* for life, if he should survive her; and after the death of both of them, to the use of or in trust for their children, if they shall have any by the said marriage, as tenants in common in tail, with cross remainders in tail; and on failure of issue by the said marriage, or in case there shall be a child or children by the said marriage, and all and every such child or children shall die under the age of twenty-one years without issue, then to the use of or in trust to return to my own family in such manner as I shall direct: Now, I do hereby agree with Mr. *Rice* that I will, either by deed or by my last will, settle such a landed estate, part of my present estates, or hereafter to be purchased by me, as shall be of greater value than 3000*l.*, to the uses and upon the trusts in the manner herein-before expressed, with the usual power of leasing; and in the meantime, and until such estate is settled, I will pay the annual sum of 150*l.* to my said daughter *Ann Weall*, independent of her husband; and after her decease, to the person or persons who, for the time, would be entitled to the rents and profits of the estates so agreed to be settled in manner before mentioned, if such settlement had been made. — *J. Weall.*"

The agreement, as originally drawn, ended with the following clause: — "And, inasmuch as I have not yet made my will, in case I should die before I do make the same, or execute a deed of settlement to the effect herein-before mentioned, then it is agreed, that the said sum of 3000*l.*, or such interest as my said daughter and Mr. *Rice*, and their issue, would take under and by virtue of this agreement, shall go and be considered as

part

part of her share of my personal estate, which she will, in the event of my dying intestate, be entitled to, as one of my children, and shall be taken into the account of my personal estate accordingly." But these words were erased; the initials of Mr. *Weall* were written in the margin over against the erasure; and on the document there was a memorandum signed by him, which stated that the erasure was made before he signed the agreement.

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The marriage was solemnised.

John Weall, by his last will, dated the 21st of *March* 1818, and duly executed and attested, gave and devised, amongst other things, as follows:— “ Also I give, devise, limit, and appoint all that my farm, consisting of a large barn, and divers closes, fields, or parcels of meadow land, containing by estimation forty-five acres, be the same more or less, partly freehold and partly copyhold, situate, lying and being in the several parishes of *Kingsbury* and *Harrow*, or one of them, in the said county of *Middlesex*, purchased by me of my brother *Benjamin*, as the same now are in the occupation of *John Field*, with the appurtenances, to, for, and upon the uses, trusts, intents, and purposes following; that is to say, to the use of my said sons, *John Weall* and *Benjamin Weall*, their heirs and assigns, for and during the natural life of my daughter *Ann*, wife of *Henry Rice* of *Jermyn Street*, upon trust to support and preserve the contingent uses and estates herein-after limited from being defeated or destroyed; and, upon further trust, from time to time during the natural life of my said daughter *Ann*, to pay unto or authorise and permit her to receive the rents and profits of the said farm and lands last above devised, when, and as the same become due and payable from time to time during

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the natural life of my said daughter, to and for her own use and benefit, separate and apart from and exclusive of her present or any future husband with whom she may intermarry, and so that the same may not be under his power or controul, or subject or liable to his debts, contracts, forfeitures, or engagements, so that the receipts of my said daughter *Ann* alone, notwithstanding her present or any future coverture, and whether she shall be married or sole, shall be sufficient discharges for the said rents and profits, and so and in such manner that she, my said daughter *Ann*, may not sell, charge, alien, assign, incumber, or otherwise anticipate all or any part of the same rents and profits, before the same shall become due and payable; and from and after her decease, then to the use of the said *Henry Rice*, the husband of my said daughter *Ann Rice*, in case he shall survive her for and during the term of his natural life, he nevertheless maintaining and educating her said child and children; and from and after the decease of my said daughter *Ann Rice* and her said husband, to the use of all and every the child and children of my said daughter *Ann Rice*, by the said *Henry Rice* lawfully begotten and to be begotten, to be equally divided between them, if more than one, share and share alike as tenants in common, and not as joint tenants, and his, her, and their respective heirs and assigns for ever: and in case any one or more of such children shall die under the age of twenty-five years without leaving any issue of his, her, or their body or respective bodies lawfully begotten, living at the time of his death or respective deaths, then as, to, for, and concerning the original share or shares of and in the said farm, lands, and hereditaments last above devised, which shall belong to the child or children respectively dying as aforesaid, and also the share or several shares of and in the same farm lands and hereditaments which such child

child or children respectively shall take under this provision by way of cross limitations, to the use of the survivor or survivors, other and others of the same children, to be equally divided among them, if more than one, share and share alike, as tenants in common, and not as joint tenants, and his, her, and their respective heirs and assigns for ever; and in case no child of my said daughter *Ann Rice* shall live to attain the age of twenty-five years, or die under that age leaving such issue as aforesaid, then to the use of such of my children *Thomas, John, Benjamin, and Elizabeth Weall*, brothers and sisters of *Ann Rice*, as shall be living at the time of her decease, and the lawful issue of such, if any, of them, the said *Thomas, John, Benjamin, and Elizabeth Weall*, as shall be then dead leaving issue then living, to be equally divided among them, if more than one, share and share alike as tenants in common, and his, her, and their respective heirs for ever; so, nevertheless, that the issue of a deceased brother or sister of the said *Ann Rice* take only the share which his, her, or their parent would have taken, if living: Provided always, and I hereby declare, that it shall and may be lawful to and for my said daughter *Ann Rice* during her life, notwithstanding her present or any future coverture, and whether sole or married, and after her decease, to and for her said husband *Henry Rice*, in case he shall survive her, and after the decease of the survivor of them, to and for the trustees or trustee for the time being acting under this my will, during the minority of any person or persons for the time being seised or entitled to any farm, lands, and hereditaments last above devised, from time to time, by indentures or indenture duly executed by her, him, or them, to demise and lease all or any part or parts of the same farm, lands, and hereditaments to any person or persons for any term or number of years not exceeding fourteen years, to take effect in possession

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session and not in reversion, or by way of future interest, so as upon every such demise or lease there be reserved or made payable, to be incident to the immediate reversion of the premises so to be demised, the best or most improved yearly rent or rents that can at the time be reasonably had or obtained for the same, without taking any fine or premium or other matter for the making thereof, and so as there be contained in every such lease a proviso or condition for re-entry for non-payment of the rent thereby reserved, by the space of twenty-eight days next after the same shall have become due and payable, and so as the person or persons, to whom any such demise or lease shall be granted, do execute a counterpart or counterparts thereof, and thereby covenant for the due payment of such rent or rents, and be not by any words or clause to be contained in such lease rendered dispunishable for waste, and so as the copyhold parts of the same farm, lands, and hereditaments be demised according to the custom of the manor whereof the same are parcel: Provided also, and I hereby further declare that after the decease of my said daughter *Ann* and her said husband, in case he should survive her, thenceforth during the minority of each or any of her children by the said *Henry Rice*, the trustee or trustees, for the time being acting under this my will, shall and may enter on, hold, and enjoy the part of the same child of and in the same farm, lands, and hereditaments last above devised, and receive and take the rents and profits thereof, and apply and dispose of such profits in the same manner as the interest or yearly proceeds of such child's share of and in the sum of 2500*l.* herein-after bequeathed, and the 'stocks, funds, and securities, in or upon which the same shall be laid out and invested, is or are herein-after directed to be applied during his or her minority. Also I direct my executors herein-after named, within six calendar months next after

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after my decease, to lay out the sum of 2500*l.* sterling in the purchase of a competent share of the 5*l.* per cent. Bank annuities, or of some other of the parliamentary stocks or funds of *Great Britain*, or at interest upon government or real securities in *England*, as they shall think fit, to be transferred unto them, or into their joint names, upon the trusts herein-after expressed or declared of and concerning the same; (that is to say,) upon trust, from time to time during the natural life of my said daughter *Ann Rice*, to pay unto and authorise, permit, and suffer her to receive and take the interest, dividends, or yearly proceeds thereof, when and as the same shall become due or payable from time to time, to and for her own use and benefit, separate and apart from, and exclusive of her present or any future husband with whom she may intermarry, and so and in such manner, and under the same or the like restrictions as herein-before expressed concerning her life-interest in the rents and profits of the farm and lands last above devised under the trusts above declared in that behalf; and from and after the decease of my said daughter *Ann Rice*, in case she shall leave any child or children her surviving, then upon trust from time to time during the life of the said *Henry Rice* her husband, in case he shall survive her, or for so long time as the said child or children of my said daughter *Ann Rice* shall live, but no longer, and until the said child or children shall severally and respectively attain the age of twenty-five years, to pay unto and authorise, permit, and suffer him to receive and take the interest, dividends, or yearly proceeds of the stocks, funds, or securities to be purchased with the said sum of 2500*l.*, to and for his own use and benefit, he, nevertheless, maintaining and educating the child or children of my said daughter *Ann Rice*; and from and after the decease of the said *Henry Rice*, in case he shall survive my said daughter

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Ann Rice, and any such child or children shall also survive her, or upon her child or children severally and respectively attaining the age of twenty-five years, which shall first happen, then, as to, for, and concerning the said sum of 2500*l.*, and the stocks, funds, and securities to be purchased therewith, upon trust for all and every the child or children of my said daughter *Ann Rice*, lawfully begotten and to be begotten, to be equally divided between them, if more than one, share and share alike, such share and shares to be paid and transferred to him, her, or them severally and respectively, as when he, she, and they shall severally and respectively attain the age of twenty-five years; and in case any one or more of them shall happen to die under the age of twenty-five years without leaving lawful issue of his, her, or their body or respective bodies, living at the time of his, her, or their death or respective deaths, then as to the original share or shares of and in the said sum of 2500*l.*, and the stocks, funds, or securities to be purchased therewith, which shall belong to the child or children respectively so dying, and also as to the share or shares of and in the same money, stocks, funds, or securities which shall from time to time be taken by such child or children under this present limitation, by way or in the nature of cross remainders, in trust for the survivors and survivor, other and others of the same children respectively, to be equally divided between them, if more than one; and in case no child of my said daughter *Ann Rice* shall survive her, or, surviving her, shall live to attain the age of twenty-five years, or die under that age leaving such issue as aforesaid, then, as to, for, and concerning the said sum of 2500*l.*, and the stocks, funds, and securities in or upon which the same shall be laid out and invested, upon trust for such of my other children, *Thomas, John, Benjamin*, and *Elizabeth Weall*, as shall be living at the decease of my said daughter

daughter

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daughter *Ann Rice*, and the lawful issue of such, if any, of the same children as shall be then dead leaving issue then living, equally to be divided between them, if more than one, share and share alike, so nevertheless that such issue take only the share which his, her, or their parent would have taken if living; and it is my will and meaning, and I do hereby direct that my said trustees and executors, in the mean time, from and after the decease of my said daughter *Ann Rice*, and of her said husband, in case he shall survive her, and thenceforth during the minority of her children, do apply all or any part of the dividends, interest, or yearly proceeds arising from the share of each of the children, of and in the trust money, stocks, funds, or securities hereby settled on him or her, in or towards his or her maintenance and education; and further, that so much, if any, of the same dividends, interest, or yearly proceeds as shall not be applied for those purposes, shall from time to time be added to the principal money of the same share, and improved at interest, together with the same and as a part thereof, by way or in the nature of compound interest, and follow and be subject to all the limitations, trusts, and dispositions herein expressed, declared, and contained concerning the principal of such share, until the same shall become payable or transferable: and I further direct and declare, that it shall and may be lawful to and for the trustees or trustee, for the time being acting under this my will, after the decease of my said daughter *Ann Rice*, and her said husband, in case he shall survive her, and also in their or either of their lifetime, with their consent and approbation, or the consent and approbation of the survivor, in writing, to advance to or for any child or children of my said daughter any part, not exceeding one half, of the value of the expectant or presumptive share of each of such children respectively, of and in the said trust money, stock, funds, and securities,

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in part of the share or shares of the same child respectively." The testator gave 6500*l.* for the benefit of his daughter *Elizabeth*: he bequeathed the residue of his personal estate to his children *Thomas Weall*, *John Weall*, *Benjamin Weall*, *Elizabeth Weall*, and *Ann Rice*, in equal shares: and he devised the residue of his real estate to his sons *John* and *Benjamin*, and appointed them his executors.

The testator paid 150*l.* a year to Mr. and Mrs. *Rice* during his life, and died in *October* 1822, without having made any settlement on them in pursuance of the articles of the 4th of *September* 1816.

After the testator's death, there were found among his papers two memorandums in his own handwriting. One of them began with the following words:—
 "This is the way I intend to leave my property and estates to my children as below stated, and have given instructions to Mr. *Palmer* of *Rickmansworth* this day, the 11th of *March* 1818, to make my will as here below stated by me *John Weall* senior, of *Hatch End* in the hamlet of *Pinner*, *Middlesex*.—My will is made by Mr. *Palmer*, and signed the 21st of *March* 1818, by me *John Weall* senior, and property left as below stated.—
 To my son *Thomas Weall* in money, 6000*l.*, to be paid in twelve calendar months. To my son *John Weall* the land at and in *Oxey Lane*" (here came an enumeration of parcels); "on the whole, I think and am sure, not worth less than

-	-	£2800	0	0
---	---	-------	---	---

Twenty-one acres meadows at *Norrid*,
 not worth less, I am sure, than

-	-	1200	0	0
---	---	------	---	---

Money to be paid in twelve calendar
 months

-	-	-	-	-	1000	0	0
---	---	---	---	---	------	---	---

£5000 0 0"

In

In another part of this memorandum were the following words:— “To *Ann Rice* the estate at *Kingsbury*, not worth less, I am sure, than 4000*l.*; money for her to be put in the stocks by the executors and trustees, 2500*l.*; 6500*l.* for my daughter *Ann Rice*.”

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The other paper began as follows:— “The account below is what I think and am sure is owing to me from my sons *Thomas*, *John*, and *Benjamin Weall*, and owing me from other people, and what I have by me in money and stock; what I have here stated is what I am worth besides estates. *May 5th, 1821.*” Then followed a statement of the debts due to him, and of his other property, exclusive of his real estates.

Henry Rice, for himself and his family, having claimed to be entitled as well to the provisions made by the settlement as to the provisions made by the will; the bill was filed by *John Weall*, *Benjamin Weall*, and *Thomas Weall*, for the purpose of having it declared that *Mr. Rice* and his wife and children were bound to elect between the provisions made for them by the will and those of the settlement.

Henry Rice, by his answer, alleged that the testator, before signing the agreement of the 4th of *September 1816*, stated that the 3000*l.*, mentioned in it as his daughter's portion, was an equivalent for the sums which he already had given to his sons for their advancement; that he should provide for all his children alike; and that, at his death, the remainder of his property should be divided equally among them. Both he and his wife insisted that they and their children were entitled to the benefits given them by the will, as well as to the provisions secured to them by the agreement.

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Mr. *Tinney* and Mr. *Barber*, for the Plaintiffs;

Mr. *Bickersteth* and Mr. *Stuart*, for Mr. and Mrs. *Rice*;

Mr. *Pemberton* and Mr. *Norton*, for the children of Mrs. *Rice*.

The two memorandums in the testator's handwriting, which are before stated to have been found among his papers, were tendered in evidence by the Plaintiffs, in order to shew that the testator did not intend that Mrs. *Rice* and her family should have any share of his property, except that which was given to them by the will.

The Defendants objected to the admission of these documents as evidence, on the ground that the question must be decided on the construction of the articles of agreement and of the will, as collected from the instruments themselves, and could not be affected by any declarations of the testator, whether made by parol or contained in written memorandums, to which neither the will nor the articles had any reference. Part of the first paper purported to have been written before the will was executed; another part of it appeared to have been written after the will, but how long after, it was impossible to conjecture. The second paper had no reference to the will, and was of a date long posterior to it. Neither of the documents was contemporaneous with the will.

On the other hand, the Plaintiffs contended that the declarations of a parent, referring to his intention at the time of making his will, were admissible in evidence to prove that he did not intend to give double portions; and that they were equally admissible for that purpose,

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at whatever time they were made. They cited *Hinchcliffe v. Hinchcliffe* (a), *Pole v. Lord Somers* (b), *Druce v. Denison*. (c)

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The MASTER of the ROLLS admitted the first paper; stating that he considered it to be settled by the cases of *Hinchcliffe v. Hinchcliffe* and *Pole v. Lord Somers*, that declarations of the parent, referring to his intention at the time of making his will, whether made at the time, or before, or after, were admissible evidence to prove that he did not mean to give a double provision. But he rejected the second paper, upon the ground that it had no reference to the intention of the testator.

On the principal question the following authorities were cited in the course of the argument:—*Jesson v. Jesson* (d); *Thomas v. Kemeys* (e); *Bruen v. Bruen* (g); *Moulson v. Moulson* (h); *Copley v. Copley* (i); *Blandy v. Widmore* (k); *Lee v. D'Aranda* (l); *Warren v. Warren* (m); *Byde v. Byde* (n); *Sparkes v. Cator* (o); *Pole v. Lord Somers* (p); *Hinchcliffe v. Hinchcliffe* (q); *Alleyn v. Alleyn* (r); *Mathews v. Mathews* (s); *Haynes v. Mico* (t); *Jeacock v. Falkener* (u); *Oliver v. Brickland* (w); *Barret v. Beckford* (x); *Devese v. Pontet* (y); *Jones v. Martin* (z);
Ellison

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| (a) 3 Ves. jun. 516. | (n) 1 Bro. C. C. 308. note. |
| (b) 6 Ves. 309. | (o) 3 Ves. jun. 530. |
| (c) 6 Ves. 385. | (p) 6 Ves. 309. |
| (d) 2 Vern. 255. | (q) 3 Ves. jun. 516. |
| (e) 2 Vern. 348.; 2 Freem. 207. | (r) 2 Ves. sen. 37. |
| (g) 2 Vern. 439.; Prec. in | (s) 2 Ves. sen. 635. |
| Chan. 195. | (t) 1 Bro. C. C. 129. |
| (h) 1 Bro. C. C. 82. | (u) 1 Bro. C. C. 295. |
| (i) 1 P. Wms. 147. | (w) Cited in 3 Atk. 420. |
| (k) 2 Vern. 709.; 1 P. Wms. | (x) 1 Ves. sen. 519. |
| 324. | (y) Prec. in Chan. 240. note |
| (l) 1 Ves. sen. 1.; 3 Atk. 419. | 1 Cox, 288. |
| (m) 1 Bro. C. C. 305.; 1 Cox, | (z) 3 Anst 882. |
| 41. | |

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Ellison v. Cookson (a). *Randall v. Willis* (b); *Lewis v. Madocks* (c); *Baugh v. Read* (d); *Forsight v. Grant* (e); *Finch v. Finch* (g); *Richardson v. Elphinstone* (h); *Couch v. Stratton* (i); *Tolson v. Collins* (k); *Freemantle v. Bankes* (l); *Twisden v. Twisden* (m); *Robinson v. Whitley* (n); *Garthshore v. Chalje* (o); *Wallace v. Pomfret* (p); *Bengough v. Walker* (q); *Curzon v. De la Zouch* (r); *Goldsmid v. Goldsmid* (s); *Thellusson v. Woodford* (t); *Wathen v. Smith* (u); *Bell v. Coleman*. (w)

It was contended on the part of the Plaintiffs, that the case came within that class of authorities which has established, that a testamentary gift made by a father to a child is to be considered as a satisfaction of any portion which the father had agreed to provide for the child, and that slight differences between the two provisions will not prevent the one from being regarded as a satisfaction of the other. Here the interest secured to Mrs. Rice, by the articles of agreement, was an estate for life to her separate use; the interest given to her by the will was also an estate for life to her separate use; and the only circumstance of difference was, that the will restricted her from anticipation or alienation. The lands at *Kingsbury* were alone of sufficient value to be a satisfaction of the agreement; and in them the husband took an estate for life in remainder after his wife's death, which

(a) 1 *Ves. jun.* 100.; 3 *Bro. C.*

C. 61.; 2 *Cor.* 220.

(b) 5 *Ves.* 262.

(c) 8 *Ves.* 150.; 17 *Ves.* 48.

(d) 1 *Ves. jun.* 257.

(e) 1 *Ves. jun.* 298.

(g) 1 *Ves. jun.* 534.

(h) 2 *Ves. jun.* 463.

(i) 4 *Ves.* 391.

(k) 4 *Ves.* 483.

(l) 5 *Ves.* 79.

(m) 9 *Ves.* 413.

(n) 9 *Ves.* 577.

(o) 10 *Ves.* 1.

(p) 11 *Ves.* 542.

(q) 15 *Ves.* 507.

(r) 1 *Swans.* 185.

(s) 1 *Swans.* 211.

(t) 4 *Madd.* 420.

(u) 4 *Madd.* 325.

(w) 5 *Madd.* 22.

was all that he was entitled to under the articles. true that the will annexed to the gift the obligation of maintaining and educating the children; but that obligation which the law itself would have imposed upon him, and the discharge of it was in furtherance of the principal object with which marriage settlements and articles for settlements are made. As to the children, the only difference between the two provisions, that under the articles the children were to be tenants in common in tail with cross remainders; but by the will, they took the *Kingsbury* property as tenants in common in fee, and they took the 2500*l.* either at the death of the survivor of the mother and father, or on their attaining twenty-five years of age at the death of their mother and in their father's lifetime.

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and slight differences were sufficient to induce the court to doubt whether the bequests given by the will were in satisfaction of the bequests stipulated for by the articles; yet, in cases of alleged double portions, the question is always one of intention; and the point to be decided is, did the testator intend that his daughter and her family should take both provisions; or did he intend to devise and bequest to them, contained in his will, to be a substitution for what they might have taken under the articles? If the latter was his intention, the objects of his testamentary bounty will not be defeated by taking what he meant them to have, and also what he did not mean them to have. It itself shewed that the testator did not conceive that Mrs. *Rice* and her family were to take more of his property than he had devised and bequeathed to them; and the memorandum of *March* 1818 removed any possible doubt on the point.

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On the other hand, it was contended for the Defendants, that the provisions made by the will for Mr. and Mrs. *Rice* and their children neither constituted a satisfaction of the articles nor raised a case of election. The articles created an obligation which bound the assets of the testator; and the first question was, had that obligation been satisfied? Clearly not. Mrs. *Rice* was entitled to claim an estate for her life to her separate use, unincumbered by any restrictions: and that claim could not be satisfied by giving her an estate for life, so qualified that she could neither anticipate nor alien it—so modified as to deprive her of the ordinary advantages attending the possession of property. The estate, which Mr. *Rice* took under the will, was clogged with a condition which amounted to a trust in favour of his children, and which would entitle them, if he did not maintain and educate them in a manner suited to their situation and prospects in life, to file a bill against him, and to call upon the Court to compel the application of a sufficient part of the income given to him by the will towards the discharge of that obligation which the will had annexed to the gift. Each child of the marriage was entitled under the articles to an interest, by way of cross remainders, in the shares of the other children: under the will they took only their respective shares. In no case had a gift by will been held to be a satisfaction for a portion, where the differences between the two provisions were so numerous and so important as they were here.

If the doctrine of satisfaction did not apply, still less could a question of election be raised. Why were the parties to lose the benefit of the contract into which the testator had entered, because he had made them also objects of voluntary bounty? There was no condition annexed to his testamentary gifts; he had nowhere said

said that Mr. and Mrs. *Rice* and their children should take what he gave them by his will in lieu of what he had contracted to secure to them ; nor was there any part of the will from which an implication to that effect could be fairly raised. Even the memorandum of *March* 1818 amounted to nothing but an estimate of the pecuniary value of the benefits which each of his children was to take under the will ; and there was no part of it from which it could be inferred, that the testator intended his daughter, her husband, and her children, to relinquish their claim under the articles. In truth, the circumstances of the case precluded election. It would be for the interest of Mr. *Rice* to take the provision stipulated for by the articles, rather than that made for him by the will ; the interest of his wife and children would be the other way : what then would be to be done, if he were to elect to take against the will, while she and the children elected to take under it ?

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The MASTER of the ROLLS.

In the argument of this case, I believe every authority has been cited which can bear upon the question. I do not think necessary to advert to them particularly ; but I shall endeavour to state distinctly the principles which I extract from the cases, and upon which my judgment proceeds.

Feb. 25.

The rule of the Court is, as, in reason, I think it ought to be, that if a father makes a provision for a child by settlement on her marriage, and afterwards makes a provision for the same child by his will, it is *primâ facie* to be presumed that he does not mean a double provision ; but this presumption may be repelled or fortified by intrinsic evidence derived from the nature of the two

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provisions, or by extrinsic evidence. Where the two provisions are of the same nature, or there are but slight differences, the two instruments afford intrinsic evidence against a double provision. Where the two provisions are of a different nature, the two instruments afford intrinsic evidence in favour of a double provision. But in either case extrinsic evidence is admissible of the real intention of the testator. It is not possible to define what are to be considered as slight differences between two provisions. Slight differences are such as, in the opinion of the judge, leave the two provisions substantially of the same nature; and every judge must decide that question for himself.

In the present case, the two provisions appear to me substantially of the same nature: and I consider that, the wife taking in both instruments to her separate use, it is but a slight difference that in the will she is restrained from anticipation and alienation — that, the husband taking in both instruments an estate for life in remainder, it is but a slight difference that in the will it is expressed that he is to maintain and educate his children — that it is but a slight difference that by the settlement the children take as tenants in common in tail with cross remainders, and that by the will they take as tenants in common in fee, and that the testator has expressed an intention to give them cross remainders by a void executory devise, if any of them die under twenty-five. These differences, as I have before observed, appear to me to leave the two provisions substantially of the same nature. My opinion, therefore, is, that, if in this case there were no extrinsic evidence, Mr. *Rice* and his family could not claim the double provisions.

But in this case there appears to me to be extrinsic evidence, which is conclusive upon the question, that,
at

at the making of the will, the testator did not intend a double provision. Upon referring to the paper written by him as instructions for his will, it is apparent that he means to dispose of his whole property, and as between his two daughters, he gives the same bounty; and it must be inferred, that when he says that he gives to *Mrs. Rice* an estate "not worth less, he is sure, than 4000 \pounds ," he has expressly in view the articles by which he had bound himself to provide for her and her family an estate of greater value than 3000 \pounds . His plain apparent intention, therefore, at the time of making his will, would be wholly defeated, if the double provision were to take effect; and upon this paper alone, the claim of *Mr. Rice* and his family would fail.

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It is argued, that the children of the marriage are not bound by the same principles. There is no ground for this distinction: the intention of the testator, which governs this case, applies to the whole family. All must elect between the two provisions.

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BETWEEN

ROLLS.
Jan. 14.
Feb. 7. 28.

PHILLIPS GRANT BOOKER, CATHERINE
BOOKER, MARY ARTIMISIA BOOKER, and
ELIZA JANE BOOKER, Infants, by GEORGE
BARKER, their next Friend, - - Plaintiffs,

AND

JOHN HENSLEIGH ALLEN, JOHN PHILLIPS
ADAMS, CHARLES RANKEN, WILLIAM
EVANS, LUKE BOOKER, HENRY GWY-
THER and MARIA PHILLIPA his Wife,
MARIA PHILLIPA GWYTHER the Younger,
JAMES HENRY ALEXANDER GWYTHER,
and Sir RICHARD PHILLIPS BULKELEY
PHILLIPS, Baronet, - - Defendants.

A testator,
who has con-
tributed to
the mainte-
nance and
education of
a female
infant nearly
related to him,
from the time

of her father's death, and who has been treated by her as the person whose con-
sent was necessary to her marriage, and who has taken upon himself the obligation
to make a provision for her in that event, is, as to the question of a double provision
by will and settlement, to be considered in *loco parentis*; and the presumption against
a double provision, which would arise in the case of a father, will apply to such a
case.

In such a case, parol evidence may be adduced to prove the intention against
a double provision, as well as on the question whether the testator was in *loco*
parentis.

Quære, Whether, if the testator was not to be considered in *loco parentis*, parol
evidence of his intention not to make a double provision by will and settlement
would be admissible?

It being proved by parol evidence that the testator intended the provision made
by the settlement to be in lieu of a legacy given by the will, the settlement was held
to be a satisfaction of the legacy, though the two provisions differed so much from
each other, that they could not be considered substantially the same.

The legacy was not set up by a codicil, made after the settlement, ratifying and
confirming the will and all the devises and bequests therein contained.

his family wholly unprovided for; and after his death, *Miss Grant* resided until her marriage, not with her mother, who survived the father, but with one of her aunts. During the life of her grandfather, she was maintained and educated at the joint expense of her grandfather and *Lord Milford*; and, the grandfather also having died in her infancy, and left her one third of his residuary estate, which amounted to about 1500*l.*, *Lord Milford* from that time made her an annual allowance, by which and the income of the 1500*l.*, but with some encroachment also on the principal, she was maintained and educated. Her aunt from time to time consulted *Lord Milford* as to the plan of her education; and *Miss Grant* was occasionally a visitor at *Lord Milford's* house.

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In *October* 1818, *Dr. Booker* made an offer of marriage to *Miss Grant* by a letter, which *Miss Grant* transmitted to *Lord Milford*, enclosed in a letter from herself, requesting his Lordship's approbation of the proposal. In answer to this application, *Lord Milford* referred her to his solicitor, *Mr. Ranken*; and on the 29th of *October*, he wrote a letter to *Mr. Ranken*, enclosing hers, in which he said, "I have referred her to you for my sentiments on this business; and I trust you will not flatter her with any hope of my consent to her union with *Dr. Booker*, until it can be found that he has an equivalent to settle upon her." On the 31st of *October* 1818, *Mr. Ranken* wrote to *Miss Grant*, informing her that, before *Lord Milford* would give his consent to the match, a settlement must be made by *Dr. Booker* at least equal to what would be made on her part, and that he was not authorised by his Lordship to name any particular sum. Notwithstanding this, the marriage took place on the 3d of *November* following, without the previous knowledge or approbation of *Lord Milford*.

Between

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Between the 19th of *November* and the 1st of *December* 1818, several interviews took place between Dr. *Booker* and Mr. *Ranken*; when it appeared that Dr. *Booker* had not any property which he could make the subject of a settlement: but he offered to insure his life for 2000*l.*, and to settle the policy, together with 1000*l.* which remained of the fortune Mrs. *Booker* took under the grandfather's will, on her and the issue of her marriage. These circumstances being communicated to Lord *Milford*, a letter, dated the 5th of *December*, and written on his Lordship's behalf by his secretary, was sent to Mr. *Ranken*, which contained the following passage: "In respect to Mrs. *Booker's* settlement, it is his intention at his decease to leave her 4000*l.*, and to allow her 100*l.* per annum, to be paid half-yearly; the first payment to be made *July* 1st, 1819." After the lapse of some time, Dr. *Booker* having effected an insurance on his life for 2000*l.* with the view of making it the subject of settlement, he and his wife were anxious that Lord *Milford* should be a party to the proposed deed, and should covenant for the payment of the 4000*l.*, and the annuity of 100*l.* a year; and this request Mr. *Ranken* communicated to Lord *Milford*. His Lordship was at first averse to complying with the application, and stated that he thought Dr. *Booker* and Mrs. *Booker* ought to be satisfied with his assurance that he would make by his will the provision he had promised them; but he afterwards consented to be a party to the settlement, and to covenant for the payment of 4000*l.* at his decease.

Accordingly, an indenture of settlement, bearing date the 21st of *June* 1820, was on that day made and executed between and by *Luke Booker* and *Elizabeth* his wife of the first part, *Richard Lord Milford* of the second part, and *Charles Ranken* and *William Evans* of the

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the third part; whereby, — after reciting that a marriage had been solemnised between *Luke Booker* and *Elizabeth Grant*, and that previously to, and at the time of, the solemnisation of the marriage, *Elizabeth Booker* was possessed of 1000*l.* Bank 3 per cent. consolidated annuities, which, upon the treaty for the marriage, it was agreed should be transferred to *Ranken* and *Evans* upon the trusts therein-after set forth; and that it was also agreed that *Luke Booker* should, after the solemnisation of the marriage, cause an insurance to be effected on his life in the sum of 2000*l.*, and should assign the policy, with the monies thereby secured, to *Ranken* and *Evans* upon the trusts thereafter declared; and further reciting, that the 1000*l.* three per cent. consolidated annuities had, since the solemnisation of the marriage, been duly transferred to *Ranken* and *Evans*, and that *Luke Booker* had effected the insurance:—it was witnessed, that, in pursuance of the said agreement, and in consideration of the marriage, and in order to make a provision for *Elizabeth Booker* in the event of her surviving her husband, and for the issue of the marriage, *Ranken* and *Evans*, their executors, administrators, and assigns, should thenceforth stand possessed of the 1000*l.* three per cent. consolidated annuities, so transferred to them, upon trust that they should permit and suffer *Luke Booker* and his assigns to receive and take the interest, dividends, and annual produce thereof during his life, and from and immediately after his decease, upon trust that they should permit and suffer *Elizabeth Booker* and her assigns to receive the dividends and annual produce of the said 1000*l.* three per cent. annuities; and from and immediately after the decease of the survivor of them, *Luke Booker* and *Elizabeth* his wife, then that *Ranken* and *Evans*, their executors, administrators, and assigns, should stand possessed of the 1000*l.* three per cent.

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cent. consolidated annuities, and the interest, dividends, and annual produce thereof, in trust for the child or children of the marriage, in the manner therein mentioned; that is to say, in case there should be but one such child, in trust for such only child, and to become and be an interest vested in such child, and to be paid, transferred, and assigned to him or her, at or on such age, day, or time as *Luke Booker* and *Elizabeth* his wife, at any time or times during their joint natural lives, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be sealed, delivered, and attested as therein mentioned, should jointly direct or appoint; and for want of such joint direction or appointment, then as the survivor of them, *Luke Booker* and *Elizabeth* his wife, at any time after the decease of such of them as should first depart this life, by any deed or deeds, writing or writings, with or without power of revocation and new appointment, to be sealed, delivered, and attested as therein mentioned, or by his or her last will and testament in writing, should alone direct or appoint; and for want of and until any such direction or appointment as therein-before mentioned, in trust for all and every the children of *Luke Booker* on the body of *Elizabeth Booker* lawfully begotten or to be begotten, equally to be divided among them, share and share alike, the share or shares of such of them as should be a son or sons to be an interest or interests vested in him or them respectively at his or their age or respective ages of twenty-one years; and the share or shares of such of them as should be a daughter or daughters to be an interest or interests vested in her or them respectively, at her or their age or respective ages of twenty-one years, or day or respective days of marriage, which should first happen, and to be paid, assigned, and transferred to them respectively, at or
on

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on the same ages, days, or times, if the same should respectively happen after the decease of the survivor of them, *Luke Booker* and *Elizabeth* his wife; but if the same should happen in the lifetime of *Luke Booker* and *Elizabeth* his wife, or the survivor of them, then immediately after the decease of such survivor: And it was thereby declared, that in case any appointment should be made in pursuance of any of the powers aforesaid which should extend only to a part or parts of the trust premises, and the residue thereof should not be so appointed as aforesaid, such partial appointment should be valid and effectual, notwithstanding the non-appointment of the remaining part or parts thereof: but in that case, any child or children, entitled to a share or shares under such appointment or appointments, should not (unless such appointment or appointments should express an intention to the contrary) be entitled to any further share or shares of or in the remaining or unappointed part or parts of the trust premises, without bringing such his, her, or their appointed share or respective shares into hotchpot, and accounting for the same accordingly: And it was declared, that if any one or more of the said children of *Luke Booker* and *Elizabeth* his wife should depart this life before he, she, or they should respectively have attained a vested interest in his, her, or their share or respective shares of the trust premises by virtue of the trusts aforesaid, or any appointment to be made in pursuance of any of the powers therein-before contained, and there should not be any such direction or appointment as aforesaid, contrary to the tenor and effect of the present proviso, then, as well the original share or shares of him, her, or them so dying, as the share or shares which should have survived or accrued to him, her, or them respectively, by virtue of this proviso, of and in the said Bank annuities and the interest, dividends,

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dends, and annual produce thereof, or so much thereof as should not have been applied for his, her, or their maintenance or advancement, in pursuance of the powers therein-after contained for those purposes, should, from time to time, go and accrue to the survivor or survivors of the said children, and the executors, administrators, or assigns of such of them (if any) as should be then dead, having first acquired a vested interest or interests in his, her, or their original share or shares, and should be equally divided between or amongst such survivor or survivors; and the representatives of such of them (if any) as should be then so dead, share and share alike, such representatives taking only the share and shares which such deceased child or children would have taken, if living; and all such surviving or accruing share or shares should become vested in and be payable or transferable to the person or persons who should become entitled to the same respectively as aforesaid; at such ages, days, and times as were thereby provided and declared touching or concerning his, her, or their original share or shares; or as near thereto as the death of parties would admit of: but in case there should be no child of *Luke Booker* on the body of the said *Elizabeth* his wife to be begotten, or in case there should be any such child or children, and none of them should live to attain a vested interest in the trust premises, the said *Ranken* and *Ewens*, and the survivor of them, and the executors, administrators, and assigns of such survivor, from and immediately after the decease of *Luke Booker* and *Elizabeth* his wife, and such failure of their children as aforesaid, were to stand possessed of the said 1000*l.* Bank annuities, and the interest, dividends, and annual produce thereof, or so much thereof as should not have been applied for maintenance or advancement, and as should not have become vested in any such child or children; in trust

for

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for such person or persons, in such parts, &c. as the said *Elizabeth Booker*, by any deed or deeds, instrument or instruments in writing, &c., or by her last will, &c., should, notwithstanding her then present or any future coverture, direct, limit, or appoint; and in default of such last-mentioned direction, limitation, or appointment, and as to so much of the trust premises to which no such direction, limitation, or appointment should extend, in trust for such person or persons as should, at the decease of the said *Elizabeth Booker*, be her next of kin by blood, and would, under the statutes made for distribution of intestates' effects, be entitled to her personal estate, in case she had died a widow and intestate. The next proviso declared, that in case there should be any child or children of *Luke Booker* on the body of *Elizabeth* his wife to be begotten, living at the time of the decease of the survivor of them, *Luke Booker* and *Elizabeth* his wife, whose share or respective shares of and in the said trust premises should not then have become vested, and there should not be any such direction or appointment as aforesaid to the contrary, it should be lawful for *Ranken* and *Evans*, or the survivor of them, or the executors, administrators, or assigns of such survivor, from and after the decease of the survivor of them, *Luke Booker* and *Elizabeth* his wife, to pay and apply the income or annual produce of the expectant or apparent share or respective shares for the time being of such child or children of and in the said trust premises, or so much thereof as they, *Ranken* and *Evans*, or the survivor of them, or the executors, administrators, or assigns of such survivor, should, in their or his discretion, think proper, for or towards the support, maintenance, and education of such child or children respectively, until such his, her, or their share or respective shares should become vested, or he, she, or they respectively should previously die; and if in
any

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any one year the trustees or trustee for the time being should not pay or apply for the maintenance, support, and education of any one or more of the said children the whole of the income or annual produce of the said expectant or apparent share, for the time being, of such child or children respectively, then that so much of such income or annual produce as should not have been so applied as aforesaid, should accumulate and go in augmentation of, and be paid, assigned, and transferred at the same time and together with the original share or shares of such child or children respectively, and be subject to such benefit of survivorship or accruer, and other limitations, as were therein before contained respecting such original share or shares; yet so, nevertheless, that it should be lawful for the said trustees or trustee for the time being, to apply the surplus and savings of the income of the share or shares of every or any such child, in any one or more preceding year or years, for and towards and in increase of his or her maintenance in any succeeding year or years. It was also declared, that it should be lawful to and for *Ranken* and *Evans*, or the survivor of them, or the executors, administrators or assigns of such survivor, at any time or times during the life-time of *Luke Booker* and *Elizabeth* his wife, or the survivor of them, with the consent in writing of them or the survivor of them, and after the decease of such survivor, at the discretion of the said trustees or trustee for the time being, in case there should not be any such direction or appointment as aforesaid, contrary to the tenor and effect of the present proviso, to sell, assign, and transfer any part, not exceeding one moiety, of the appointed expectant or apparent share or shares, for the time being, of such of the said children of the said marriage as should be a son or sons, of or in the said trust premises, and to apply the monies to be produced by every such sale or transfer

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fer in the placing or putting him or them, whose share or shares should be so in part sold or transferred, in or to any business, profession or employment, or in the purchasing of any commission or commissions in the army or otherwise, for his or their respective preferment or advancement in the world, notwithstanding his or their share or respective shares of and in the said trust premises, should not then have become vested or payable or transferable as aforesaid." Clauses followed, giving powers to sell the 1000*l.* stock, to lay it out on other securities, to vary these securities from time to time, and to lay out the money in the purchase of freehold or copyhold lands. The policy of assurance, too, was assigned to *Ranken* and *Evans*, who were to stand possessed of all sums of money which should be received in respect of it, and the securities in which they might be invested, on the same trusts and subject to the same provisos and powers as were expressed concerning the 1000*l.* stock: and Dr. *Booker* covenanted to keep the policy on foot at his own costs.

The indenture then recited that, upon the treaty for the marriage, it was agreed that Lord *Milford* should enter into a covenant for payment of the sum of 4000*l.* within six calendar months next after his decease, to trustees for the benefit of *Luke Booker* and *Elizabeth* his wife and their children, and with such limitations over as were therein-before mentioned: and accordingly Lord *Milford* for himself, his heirs, executors, and administrators, covenanted with *Ranken* and *Evans*, their executors, administrators, and assigns, that the heirs, executors, or administrators of him Lord *Milford* would, within six calendar months next after his decease, pay or cause to be paid unto *Ranken* and *Evans*, or the survivor of them, or the executors, administrators, or assigns of such survivor, or the trustee or trustees for the

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time being acting in the execution of the said indenture, the principal sum of 4000*l.* but without any interest for the same: And it was declared that *Ranken* and *Evans*, their executors, administrators, or assigns, or others the trustee or trustees for the time being, should stand possessed of and interested in the said principal sum of 4,000*l.* upon trust that they should lay out and invest the same in or upon the public stocks or funds of *Great Britain*, or upon government or real securities in *England* or *Wales*, and should from time to time sell, transfer, alter, vary, and transpose the same stocks, funds, or securities in, to, or for others of the same or a similar nature as to them or him should seem expedient; yet so that no such investments, sale, alterations, or transpositions, should be made during the lifetime of the said *Luke Booker*, and *Elizabeth* his wife, or the survivor of them, without their or his consent or approbation in writing; and that the said trustee or trustees for the time being should stand and be possessed of and interested in the last mentioned stocks, funds, and securities, and the interest, dividends, and annual produce thereof, upon and for the same trusts, intents, and purposes, and with, under, and subject to the same powers, provisos, declarations, and restrictions, as were thereinbefore expressed, declared, and contained of and concerning the said sum of 1000*l.* Bank three per cent. consolidated annuities, and the interest, dividends, and annual produce thereof, or such and so many of them as should be then subsisting undetermined or capable of taking effect.

After the marriage of Dr. *Booker* and *Elinabeth Grant*, but before the execution of the settlement, Lord *Milford* had made his will, dated on the 21st of *January* 1820, which was partly in the following words:—

“ I give

“ I give and bequeath unto my friends, *James Ackland*, of *Amroth House* in the said county of *Pembroke*, Esq., and *John Hensleigh Allen*, of *Cressley* in the same county, Esq., their executors and administrators, the sum of 4000*l.* upon the trusts, and for the ends, intents, and purposes, and with, under, and subject to the provisions and declarations hereinafter expressed and declared, of and concerning the same (that is to say), upon trust, that they the said *James Ackland* and *John Hensleigh Allen*, or the survivor of them, or the executors and administrators of such survivor, do and shall, immediately after my decease, lay out and invest the same sum of 4000*l.* in their or his names or name, in the purchase of some of the parliamentary stocks or public funds of *Great Britain*, being of a permanent nature and not of a limited period, or at interest upon real securities in *England* or *Wales*, and also do and shall from time to time alter, vary, and transpose, all or any of such stocks, funds, or securities as they or he shall think fit; with powers for the said trustee or trustees, for the aforesaid purposes or any of them, to give complete acquittances and discharges in writing, to any person or persons paying, or discharging, or purchasing any of the aforesaid trust monies, stocks, funds, and securities; and upon further trust, that they the said *James Ackland* and *John Hensleigh Allen*, or the survivor of them, or the executors or administrators of such survivor, do and shall, during the life of my relative *Elizabeth Booker*, the wife of the Rev. *Luke Booker*, Doctor of Divinity, Rector of *Dudley* in the county of *Worcester*, and the daughter of my kinswoman *Maria Phillipa Gwyther*, wife of the Rev. *Henry Gwyther*, curate of *Westbury* in the county of *Wilts*, by her first husband, *John Grant*, Esq., deceased, pay the interest, dividends, and annual produce of the said stocks, funds, and securities, unto such person or persons,

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sons, and for such intents and purposes as the said *Elizabeth Booker*, by any writing to be signed with her own hand, shall, notwithstanding her present or any future coverture, from time to time direct or appoint; and until and in default of any such direction or appointment, into her own proper hands for her own sole and separate benefit, independently of, and free from the debts, control, or interference of the said *Late Booker*, or any future husband with whom she may intermarry: and I will and declare that the receipts of the said *Elizabeth Booker*, or of such other person or persons as she shall or may from time to time direct or appoint as aforesaid, shall, notwithstanding her present or any future coverture, and whether she be covert or sole, be good and effectual releases and discharges for the same, or so much thereof as in such receipts shall be expressed to have been received; and from and immediately after the decease of the said *Elizabeth Booker*, upon trust, that they the said trustee or trustees do and shall pay and transfer the said principal money, stocks, funds, and securities, unto all and every the child or children of the body of the said *Elizabeth Booker* lawfully begotten or to be begotten, equally to be divided between or amongst them, share and share alike, if there shall be more than one, and if there shall be but one such child, the whole to be paid or transferred to such child or children at the times or time and in manner following (that is to say), the share or shares of such of them as shall be a son or sons to become vested in him or them respectively on his or their attaining the age of twenty-one years, and to be paid or transferred to him or them on his or her attaining that age, if the same should happen after the decease of the said *Elizabeth Booker*, but if in her lifetime, then to be paid to him or them immediately after her death, and the share or shares of such of the said child or children as shall be a daughter

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daughter or daughters to become vested in her or them respectively, when she or they shall respectively attain the age of twenty-one years, or be married, which shall first happen, and to be paid or transferred to her or them respectively, when she or they respectively shall attain the same age or be married, if the same shall happen after the decease of the said *Elizabeth Booker*, but if in her lifetime, then immediately upon her death: provided always, and I do hereby declare my will to be, that if one or more of such child or children shall depart this life, before he, she, or they shall attain a vested interest in the said trust monies, stocks, funds, or securities by virtue of this my will, then the share or shares of him, her, and them so dying, shall go and accrue to the survivor or survivors, or other or others of such children, and be equally divided amongst them, if more than one, share and share alike, as the same shall become vested, payable, and transferable, at the same days and times as are herein-before mentioned with respect to his, her, and their original share or shares of the said trust monies, stocks, funds, or securities; and in case of the death of any other of such children, before such accruing or surviving share or shares shall become vested as aforesaid, then every such accruing and surviving part or share shall be again subject and liable to such right, chance, contingency, or condition of accruer, to and amongst the survivor or survivors and other or others of the said children as herein-before is provided touching the same original share or shares thereof: and upon further trust that any such trustee or trustees do and shall after the decease of the said *Elizabeth Booker* pay and apply the dividends and interest of the share or shares of such of the said children as shall not have acquired a vested interest in the said trust monies, stocks, funds, or securities, for and towards his, her, or their maintenance and education respectively, until the same respectively shall be-

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come payable : and in case there shall be no child of the body of the said *Elizabeth Booker* lawfully begotten, or, there being one or more such child or children, all of them shall happen to die without having attained a vested interest or vested interests in the said trust monies, stocks, funds, and securities, under the trusts aforesaid, then and in such case it is my will that they the said *James Ackland* and *John Hensleigh Allen* or the survivor of them, or the executors or administrators of such survivor do and shall, immediately after the decease of the survivor of the said *Elizabeth Booker* and such child or children, pay the interest, dividends, and annual produce of the said trust monies, stocks, funds, and securities, unto the said *Maria Phillipa Gwyther* and her assigns for and during her life, for her and their own use and benefit; and from and immediately after the decease of the said *Maria Phillipa Gwyther*, to *Maria Phillipa*, the daughter of the said *Maria Phillipa Gwyther* by the said *Henry Gwyther*, until she shall attain the age of twenty-one years, or be married, and when she shall attain that age or be married, do and shall pay and transfer the whole of the said trust monies, stocks, funds, and securities, unto the said *Maria Phillipa Gwyther*, her executors, administrators, and assigns, for her own absolute use and benefit : but in case the said *Maria Phillipa Gwyther* shall die, before she shall attain the age of twenty-one years or be married, then my will is that the whole of the said principal monies, stocks, funds, and securities, shall go to my executors herein-after named upon the like trusts, and for the like ends, intents, and purposes, as are herein-after declared with respect to the residue of my personal estate." He appointed *James Ackland* and *John Hensleigh Allen* his executors.

In *September* 1820, Lord *Milford* made a codicil to his will, giving a small annuity ; and in *October* 1820, another

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another codicil, giving another small annuity. *James Ackland* having died, his Lordship made a third codicil, dated the 28th of *July* 1821. After mentioning the death of *Ackland*, and expressing his desire to appoint *John Phillips Adams* a trustee and executor in his stead, and to give another legacy in addition to those given by his will, he, by this codicil, which he directed to be taken as part of his will, appointed *John Phillips Adams* to be a trustee in conjunction with *Hensleigh*; and, for further effectuating his said desire, he “gave, devised, and bequeathed unto the said *John Phillips Adams* and *John Hensleigh Allen*, their heirs, executors, administrators, and assigns respectively, all and singular so much and such part of his real and personal estate as were by his said will given, devised, and bequeathed unto the said *James Ackland* and *John Hensleigh Allen*, their heirs, executors, administrators, and assigns respectively, to have, hold, receive, and take the same unto and by the said *John Phillips Adams* and *John Hensleigh Allen*, their heirs, executors, administrators, and assigns respectively, for and during the like estates and interests, in the like manner, to, upon, and for the like uses, trusts, interests, and purposes, and with, under, and subject to the like powers, provisos, conditions, declarations, and agreements as were in and by his said will given, devised, bequeathed, limited, directed, expressed, declared, and contained of and concerning the same parts of his said real and personal estates so thereby given, devised, and bequeathed unto the said *James Ackland* and *John Hensleigh Allen*, their heirs, executors, administrators, and assigns respectively as aforesaid.” The testator then gave, devised, and bequeathed unto the said *John Phillips Adams* the sum of 100*l.*, to be paid to him immediately after his decease, and nominated, constituted, and appointed the said *John Phillips Adams* and

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John Hensleigh Allen executors of his said will and of that his said codicil, upon the trust aforesaid: and he thereby “ratified and confirmed his said will, and all devises and bequests, matters and things therein mentioned and contained, and not thereby and therein revoked, altered, or varied.”

Lord *Milford*, on the 14th of *October* 1822, made a fourth codicil, bequeathing three small legacies.

Lord *Milford* died on the 28th of *November* 1823; Mrs. *Booker* died in *January* 1826, leaving her husband and four infant children her surviving.

The bill was filed by the children of Dr. and Mrs. *Booker* for the purpose of asserting their title to the benefits given them by Lord *Milford*’s will, in addition to the provisions made for them by his covenant in the settlement. The bill charged that it was the meaning and intention of Lord *Milford* that both the sum of 4000*l.* covenanted by the settlement to be paid, and also the sum of 4000*l.* bequeathed by his will, should upon his decease become payable for the benefit of *Elizabeth Booker* and her issue; that *Elizabeth Booker* was his near kinswoman and relative; that Lord *Milford* was a single man, and never had any family of his own; that he had adopted, brought up, and educated *Elizabeth Booker* from her infancy at his own expense; that he always acted towards her as a parent, and on all occasions expressed himself as being much attached to her, and anxious for her advancement and welfare in the world; and that, from the time of the marriage down to his death, his Lordship had paid to Dr. *Booker*, by way of bounty and in order to assist in the support of his wife and family, an annual allowance of 200*l.* The prayer was, that it might be declared that the personal estate

estate and effects of Lord *Milford* were liable to the payment of the principal sum of 4000*l.* covenanted by the indenture of settlement to be paid by him, with interest from the end of six months after his decease, and also to the payment of the legacy of 4000*l.* with interest, to be computed from the end of twelve months after his decease.

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Sir *Richard Phillips Bulkeley Phillips*, the residuary legatee of Lord *Milford*, and brother of Mrs. *Booker*, by his answer admitted that Lord *Milford* had contributed to her maintenance and education in the manner already mentioned; that he had shewn her the regard usual among relations; and that she had been an occasional visitor at his house. He then said, "that it was not true that Lord *Milford* did adopt, bring up, and educate *Elizabeth Booker* from her infancy at his own expense, or otherwise than as aforesaid; or that Lord *Milford* did stand towards *Elizabeth Booker* in the place and situation of a father, or that he professed and expressed or shewed in any manner, further or otherwise than as aforesaid, great interest or regard for her or for her advancement and welfare in the world."

According to the evidence, Lord *Milford* had contributed regularly to the maintenance and education of Mrs. *Booker* before her marriage, and was consulted as to the mode of bringing her up; and she was frequently at his house as a visitor. About the time when she came of age, a proposal of marriage was made to her by a Mr. *Unthank*, and upon that occasion she applied to Lord *Milford* for his consent to the match. Lord *Milford* approving of the marriage, authorised his solicitor to communicate to the father of the intended husband, that the provision, which he meant to make for Miss *Grant*, was the sum of 4000*l.* to be paid at his death.

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death. Accordingly the father of the intended husband, who was a solicitor, prepared a draft of a settlement; by which the sum of 4000*l.* was to be settled on Miss *Grant* and the intended husband and their issue. This draft was submitted to Lord *Milford's* solicitor for his perusal, and, being approved by him, was afterwards engrossed; but, finally, the marriage with Mr. *Unthank* did not take effect.

In 1815, another offer of marriage was made to Miss *Grant*, on which Lord *Milford* was consulted; and communications took place between him and the intended husband as to the amount of the provision which he meant to make for the lady; but this negotiation, also, was ultimately broken off.

Mr. *Ranken*, in his deposition, after proving the circumstances connected with the proposal of marriage on the part of Dr. *Booker*, stated, that, “about the time when *Richard* Lord *Milford* did so consent to concur in such settlement, he expressly informed deponent, and desired deponent to inform the defendants, *Luke Booker* and *Elizabeth* his wife, that he had done so on the recommendation of the deponent for their satisfaction; and that the provision, which he had agreed to make by such settlement, was in lieu of the provision which he had promised and agreed to make by his will for the said *Elizabeth Booker*; and that he, deponent, did so expressly inform the defendants, *Luke Booker* and *Elizabeth Booker*, accordingly.

Mr. *Pemberton* and Mr. *Wheatley*, for the Plaintiffs.

The presumption against double provisions coming from a parent to a child, is founded on the principle that it is the intention of the parent, in making the provision,

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vision, to satisfy the moral obligation he is under: but, a stranger or collateral relation not being under any such obligation, his gifts are mere bounty; there is no measure by which that bounty can be limited, except the language of the instruments by which it takes effect; and a legacy given by his will would not be deemed to be satisfied by a settlement subsequently made, even if the two provisions were the same, or so similar as not to be substantially different. *Shudal v. Jekyll* (a), *Powel v. Cleaver* (b), *Brown v. Peck*. (c) In the present case the two provisions are essentially different. Under the will, Dr. *Booker* takes nothing, and Mrs. *Booker* takes an immediate estate for life to her separate use; the settlement gives Dr. *Booker* a life interest, and gives Mrs. *Booker* nothing till after his death; under the will, the children, on the death of their mother, become entitled to the 4000*l.* in equal shares; under the settlement, their interests are postponed till the death of their father, and are subject to a power of appointment. Even, therefore, if the provision had come from a parent, it would be impossible to contend that the settlement was either a satisfaction or an ademption of the legacy.

The parol evidence that the testator intended the settlement to be a satisfaction of the legacy, cannot be received; for though such evidence has been received to support the presumption against double portions, it cannot be admitted where the presumption does not exist. If it be said that Lord *Milford* is proved to have placed himself in *loco parentis*, and that parol evidence of his intention is therefore admissible, we deny that parol evidence can be received for the purpose of letting in other parol evidence. The testimony, which is tendered here,

(a) 2 *Atk.* 516.

(b) 2 *Bro. C. C.* 499.

(c) 1 *Eden*, 140.

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here, is in contradiction to the tenor of the instruments themselves, and to the answer of the principal Defendant, who denies that Lord *Milford* did place himself in the situation of a parent towards Miss *Grant*.

If the settlement were, in itself, a satisfaction or ademption of the legacy given by the prior will, the third codicil will prevent that consequence from ensuing. The codicil republishes the will; it makes the will speak from that date; and it expressly ratifies and confirms all the bequests contained in the will. In fact, therefore, Lord *Milford* has by a testamentary instrument, long after the date of the settlement and of his alleged communication to Mr. *Ranken*, bequeathed to the infant Plaintiffs the legacies which they now claim: and it must have been the intention of Lord *Milford* that Mrs. *Booker* and her children should take the legacy as well as the provision secured for them by his covenant: *Jackson v. Hurlock* (a), *Robinson v. Whitley* (b), *Hurst v. Beach*. (c)


Mr. *Tinney* and Mr. *Harwood*, for Dr. *Booker*, supported the argument of the Plaintiffs, and cited *Debex v. Mann* (d), *Roome v. Roome* (e), *Dundas v. Dutens* (g), and *Hartopp v. Hartopp*. (h)

Mr. *Bickersteth*, for the residuary legatee, first insisted that Lord *Milford* was to be considered as having placed himself in *loco parentis* towards Miss *Grant*, so that the case was to be governed by the same rules which applied to parent and child.

Mr.

(a) 2 *Eden*, 263.(b) 9 *Ves.* 577.(c) 5 *Madd.* 351.(d) 2 *Bro. C. C.* 519.(e) 3 *Atk.* 181.(g) 1 *Ves. jun.* 196.; 2 *Cor.* 235.(h) 17 *Ves.* 184.

Mr. *Pemberton* objected, that it was not open to the Defendant to allege that Lord *Milford* had placed himself in *loco parentis* towards the lady, or to tender evidence on that point, even if such evidence were admissible, because by his answer he had alleged the contrary; and the passage of the answer, already referred to, was read in support of the objection.

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Mr. *Bickersteth* answered, that the bill alleged that Lord *Milford* had placed himself in the relation of a parent towards the lady, and that the Plaintiffs could not now be allowed to controvert their own allegation. The passage of the answer, which had been referred to, amounted to no more than this, that Lord *Milford* had not placed himself in the situation of a parent further or otherwise than as appeared by the acts and conduct therein mentioned; but these acts and conduct sufficiently established that, for the purposes of the present question, he was to be considered in *loco parentis*.

The MASTER of the ROLLS expressed his opinion, that the answer was to be taken as meaning no more than that Lord *Milford* did not place himself in the situation of a father otherwise or further than as the inference that he did so might arise from the facts admitted by the Defendant.

Mr. *Bickersteth* and Mr. *Pole* continued their argument for the residuary legatee.

The relationship between Miss *Grant* and Lord *Milford*, his pecuniary contributions towards her maintenance and education, and the interest he took in all her concerns, place him towards her in the relation of a parent. Whenever any treaty of marriage was in agitation, he was the first person consulted; it was with him

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him that the husband and the husband's relations communicated on the subject of the portion he meant to give the lady ; and it never for one moment occurred to him to suggest that she was not to derive a portion from him. These are matters which must necessarily be established by parol evidence ; and they are completely established here. Lord *Milford* voluntarily took upon himself obligations which law or nature did not impose upon him ; and he is entitled to the benefit of all the presumptions which would exist between a parent and child. The consequence is, that evidence may be received that a provision made by him on the marriage of the lady was a satisfaction of a legacy given her by his will : *Ex parte Pye* (a), *Monck v. Monck* (b), *Rosewell v. Bennet* (c), *Hartopp v. Hartopp*. (d) In *Shudal v. Jekyll* (e), parol evidence was received of the testator's declarations. The evidence here shews beyond all doubt that Lord *Milford* did not mean to make two provisions for his relation and her family ; and, on the contrary, that the covenant was entered into at their request and upon their importunity, and was a substitution for the legacy.

If the legacy given by the will is to be considered as satisfied by the provision made by the settlement, it is in substance adeemed : it ceases to be an operative part of the will, and the subsequent codicil cannot operate as a new gift : *Izard v. Hurst* (g), *Drinkwater v. Falconer* (h), *Crosbie v. M'Doual*. (i) In *Monck v. Monck*, a legacy, given by a person standing in *loco parentis*, was adeemed or satisfied by a provision made for him on his marriage ; and a subsequent codicil, by which the testator

“ ratified

(a) 18 *Ves.* 140.(b) 1 *Ball & Be.* 293.(c) 3 *Atk.* 77.(d) 17 *Ves.* 184.(e) 2 *Atk.* 516.(g) 2 *Freem.* 224. 2 *Eq. Ca.**Ab.* 769.(h) 2 *Ves.* sen. 623.(i) 4 *Ves.* 610.

“ratified and confirmed his will in all respects,” was held not sufficient to set up the bequest.

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Mr. Pemberton, in reply.

In *Hurst v. Beach*, the language of the Court was this: “Where the Court raises the presumption against the intention of a double gift, by reason that the sums and the motive are the same in both instruments, it will receive evidence that the testator actually intended the double gift he has expressed. In like manner, evidence is received to repel the presumption raised against an executor’s title to the residue, from the circumstance of a legacy given to him; and to repel the presumption that a portion is satisfied by a legacy. In all these cases the evidence is received in support of the apparent effect of the instrument, and not against it. I am of opinion, therefore, that such evidence cannot be received without breaking in upon the primary rule, that parol evidence is not admissible against the expressed effect of a written instrument.” (a) Here the parol evidence is tendered to counteract what would be the effect of the will and settlement, if these two instruments were construed without reference to any thing not contained in them.

In *Ex parte Pye*, Lord Eldon, speaking of the doctrine that a legacy might be satisfied by a portion, says (b), “The Court seems, in the older cases, to have met with some difficulty in determining whether this rule should be confined to those who stood in the actual relation of parent and child; and it has accordingly been urged in argument, but not supported by decision, except where accounted for by evidence of declarations, that the Court have

(a) 5 Madd. 360.

(b) 18 Ves. 151.

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have said, they did not mean to confine this doctrine to persons standing in that actual relation ; but perhaps it might apply to a person placing himself in *loco parentis*, undertaking the care of an orphan : but what is to be the evidence of that, whether written evidence in the will and settlement, or the conduct observed at the marriage, or to be derived from mere declarations, is left so much afloat, that there is considerable difficulty in making a judicial decision upon it." The evidence, which is here offered, to prove that Lord *Milford* placed himself in *loco parentis*, does not come within even any of the classes to which Lord *Eldon* refers in language implying any thing rather than a sanction of their admissibility.

Lord *Hardwicke*, in *Shudal v. Jekyll*, has stated what circumstances must concur, to bring bounty proceeding from a collateral relation within the rule against double portions. "This Court," says his Lordship (a), "leans strongly against double portions or double provisions ; and whether the portion given in the lifetime is less or not, is no ways material : but all these cases differ extremely from a bounty given by a remote relation ; though I will not say but there may be cases between collateral relations which would be considered as an ademption ; for suppose a child to be an orphan, without father or mother, under the care of a collateral relation, who by his will gives her a legacy, and expresses it to be for her portion, and afterwards make a provision for her in his lifetime, I should be inclined to think this an ademption. But in the present case, the Plaintiff's father is living ; and a collateral relation only, her great uncle, gives her a general legacy. Now, I do not know any case where such a relation's giving a general legacy, and afterwards

advancing

(a) 2 Atk. 518.

advancing the same person in his lifetime, has been held to be a satisfaction, and therefore differs from the cases of fathers or grandfathers standing in *loco parentis*." Thus, before a testator can be considered as placing himself in *loco parentis*, the object of his bounty must be an orphan, without father or mother; secondly, he must have taken the individual under his care; and thirdly, the legacy must be expressed by the will to be by way of portion. In *Monck v. Monck* (a), every one of these three circumstances existed.

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Supposing it to be established or assumed that Lord *Milford* was in *loco parentis* towards the lady, there is neither principle nor authority for receiving his communications made either directly or indirectly to Mr. *Ranken*, as evidence to vary the rights of Mrs. *Booker's* children under the will and the settlement.

Even between parent and child, an advancement or settlement upon marriage cannot be considered an ademption or satisfaction of a legacy, unless the two gifts be substantially the same; they must be to the same individuals, for the same purposes, and with limitations or modifications not essentially different. Here the two gifts are totally dissimilar. How could an interest limited to Mrs. *Booker* after the death of her husband be a satisfaction of the immediate life-interest which the will gave her to her separate use? The fund comprised in the settlement may be appointed to one of the children; how could the benefits taken by that one child be a satisfaction and ademption of the vested and indefeasible interests which each of the other children, upon attaining twenty-one, took in their respective shares of the money given by the will, unless it is to be held that a legacy given to one person may be satisfied by a provision

(a) 1 *Ball & Be.* 298.

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vision made for another? If the legacy is to be considered as satisfied, it must be satisfied in *toto*: then supposing all the children to die under twenty-one, what becomes of the interests of Mrs. *Gwyther* and her daughter under the ultimate limitation over? Their rights cannot be adeemed by a settlement in which their names are not mentioned; and if the legacy is to exist for one purpose, it must remain a valid bequest for all.

Feb. 28.

The MASTER of the ROLLS.

On the 3d of *November* 1818, a marriage was had between Dr. *Booker*, one of the defendants, and Miss *Elizabeth Grant*, his late wife. Miss *Grant* was a cousin and one of the nearest relations of the late Lord *Milford*, who died unmarried and without issue; and her brother, the Defendant Sir *Richard Phillips*, was the devisee of his great estates. The father of Miss *Grant* died, leaving his family wholly unprovided for. Miss *Grant's* mother survived the father; but after the death of the father Miss *Grant* resided, not with her mother, but with one of her aunts until her marriage; and, during the life of her grandfather, she was maintained and educated at the joint expense of her grandfather and Lord *Milford*. The grandfather also died in her infancy and left her one third of his residuary estate, which amounted to the sum of 1500*l.*, and after the death of the grandfather, Lord *Milford* made her an annual allowance, by which and the income of the 1500*l.* she was maintained and educated. Her aunts from time to time consulted Lord *Milford* as to the plan of her education, and Miss *Grant* occasionally visited Lord *Milford*. About the time of her coming of age, a proposal of marriage was made to her by a Mr. *Unthank*; and upon that occasion Miss *Grant* applied to Lord *Milford* for his consent to the marriage. Lord *Milford*,
approving

approving of the marriage, authorised his solicitor to communicate to the father of the intended husband, that the provision, which he meant to make for Miss *Grant*, was the sum of 4000*l.* to be paid at his death; and a draft of a settlement was in consequence prepared by the father of the intended husband, who was a solicitor, and was submitted to Lord *Milford's* solicitor for his perusal. Being approved by him, it was afterwards engrossed; and by it the sum of 4000*l.* was to be settled on Miss *Grant* and the intended husband and their issue; but the marriage with Mr. *Unthank* did not take effect.

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The offer of marriage, made by Dr. *Booker* to Miss *Grant*, was by a letter, which Miss *Grant* inclosed to Lord *Milford*, requesting his approbation; and in answer to such letter Lord *Milford* desired his solicitor to communicate to Miss *Grant*, that before he would give his consent, he must require from Dr. *Booker* a settlement on his part equal to what might be made on the part of Miss *Grant*. The solicitor of Lord *Milford* had afterwards several interviews with Dr. *Booker*, when it appeared that all that Dr. *Booker* could do was to insure his life for a sum of 2000*l.*, and to settle on Miss *Grant* and her issue the policy of assurance, and 1000*l.* which then remained to her of her fortune under the will of her grandfather; and at the time, Lord *Milford's* solicitor, at Lord *Milford's* desire, communicated to Dr. *Booker* that it was his intention at his decease to leave Miss *Grant* 4000*l.*, and to give her an annuity of 100*l.* per annum during her life. Miss *Grant* afterwards married Dr. *Booker*, without any settlement being made. But, after the marriage, the solicitor of Lord *Milford*, at the request of Dr. and Mrs. *Booker*, applied to Lord *Milford* to make the settlement which he had proposed; and thereupon Lord *Milford* stated, that he thought the parties ought to be satisfied with his assurance that he would make his will as he had

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promised to do. Subsequently, however, Lord *Milford*, at the request of his solicitor, consented to execute a deed for the payment of the 4000*l.* at his death, but expressly desired his solicitor to inform Dr. and Mrs. *Booker* that he consented to do so upon the recommendation of his solicitor and for the satisfaction of Dr. and Mrs. *Booker*, and that the provision, which he agreed to make by such settlement, was in lieu of the provision which he had promised and agreed to make for Mrs. *Booker* by his will. Thereupon the indenture of settlement, bearing date the 21st of *June* 1820, was executed.

Lord *Milford* had previously, namely, on or about the 21st of *January* 1820, made his will of that date, whereby he gave a sum of 4000*l.* upon trust, to pay the dividends to Mrs. *Booker* for life to her separate use; and after her death, for the children of the marriage in equal shares; the shares to vest in sons at twenty-one, and in daughters at twenty-one, or marriage; with a limitation over, if there was no child of the marriage who attained a vested interest, to the mother of Mrs. *Booker* during her life, and after her death, to Mrs. *Booker's* sister of the half blood. After the settlement, Lord *Milford* published four codicils to his will; and by the 3d of these, which bore date on the 28th of *July* 1821, he ratified and confirmed his will and all the devises and bequests therein contained, which were not varied or revoked by the codicil.

Lord *Milford* died on the 28th of *November* 1823: Mrs. *Booker* died in the month of *January* 1826, leaving the Defendant Dr. *Booker* her surviving, and the four infant Plaintiffs, her children: and the bill was filed by the infants claiming for themselves and their father the benefits of the two provisions made by the will and settlement.

It

It was argued for the Plaintiffs, that the rule of presumption against double portions did not apply in this case; Lord *Milford* not being the parent nor to be considered in *loco parentis*; that, if Lord *Milford* could be considered as standing in *loco parentis*, the provisions in the settlement were of a different nature from those in the will; and that, after making the settlement, the provisions by the will were expressly confirmed by the language of the third codicil.

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In the argument it was made a question, whether parol evidence was admissible to prove that a testator was to be considered as having placed himself in *loco parentis*. I find no authority for excluding such evidence; and inasmuch as the conclusion is to arise from facts extrinsic of the will, I am of opinion, that parol evidence is admissible for such purpose. I am further of opinion, that Lord *Milford* is to be considered as having placed himself in *loco parentis*; it being established by the evidence, that Lord *Milford* had not only contributed to the maintenance and education of Mrs. *Booker*, who appears to have been one of his nearest relations, from the time she lost her father in her early infancy, but that he was consulted as to the plan of her education and was regarded by Mrs. *Booker* as the person whose consent was necessary to her marriage, and that he had expressly taken upon himself the obligation to make a provision for her in that event.

The presumptions against a double portion, which arise in the case of two provisions made by a parent, arise in the case of the two provisions here, and are to be fortified or repelled by intrinsic or extrinsic evidence. In this case the provisions by the two instruments can hardly be considered substantially of the same nature; so as to afford intrinsic evidence against a double provision; but it is proved by Lord *Milford's* solicitor,

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who prepared the settlement, that, when, by the desire of Dr. and Mrs. *Booker*, he applied to Lord *Milford* upon the subject of the settlement, Lord *Milford* stated that Dr. and Mrs. *Booker* ought to have been satisfied with his assurance that he would make his will as he had promised to do, and that when Lord *Milford* consented to execute the settlement, he directed his solicitor to inform Dr. and Mrs. *Booker* that the settlement was in lieu of the provision which he had promised to make by his will. The extrinsic evidence, therefore, excludes the intention of a double provision.

Being of opinion, that Lord *Milford* is to be considered as having placed himself in *loco parentis*, it is not material to the decision to say what would have been the effect of this declaration of his intention, if he could not be so considered.

It is argued that the third codicil, which was made by Lord *Milford* long after the settlement, and which in words ratifies and confirms the will and all devises and bequests therein contained and not altered or revoked by the codicil, manifests an intention on the part of Lord *Milford* in favour of the double provision. In my judgment, the true construction of this codicil is, that the will is to have the effect which it would have had, if the codicil had not been made, except as altered by the codicil, and that if the double provision would not have taken place if the codicil had not been made, it will not be set up by that codicil. This reasoning is consistent with the decision in *Crosbie v. Macdoul* (a) and the other cases which have been cited.

Declare therefore that the provision made by the settlement for Dr. and Mrs. *Booker* and their children is a satisfaction of the provision intended for Mrs. *Booker* and her children by the will.

(a) 4 Ves. 610.

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THE will of *H. C. Bowles*, dated the 18th of April 1827, contained, among other bequests, the following: — “And whereas, having on the marriage of my daughters, *Anne Sarah Treacher* and *Jane Mary Reeves*, with their respective present husbands, advanced and transferred to or for the benefit of each of them the sum of 900*l.* in the stock of the Governor and Company of the Bank of *England*, and also given to each of my said daughters the sum of 500*l.* sterling, I do hereby give and bequeath the like sum of 900*l.* like Bank stock, and the like sum of 500*l.* sterling unto my youngest son *John Bowles*; and I do also give and bequeath the like sum of 900*l.* like Bank stock, and the like sum of 500*l.* sterling, unto my executors and trustees hereinafter named, to be by them held and applied upon and for the same trusts, intents, and purposes, for the benefit of my daughter *Francisca Bowles* and her issue, as are hereinafter expressed and directed of and concerning the one-fifth part hereinafter bequeathed in favour of my said daughter and her issue, of and in my residuary personal estate.”

These trusts were, to pay the interest to the daughter during her life, to her separate use, and, without power

A testator, by his will reciting that he had on the marriage of two of his daughters advanced and transferred for their respective benefit 500*l.* sterling and 900*l.* bank stock, bequeathed 500*l.* sterling and 900*l.* bank stock in trust for his remaining daughter *Francisca* during her life, to her separate use, without power of anticipation or alienation; then for her children, subject to an exclusive power of appointment by her; and if there were no children in whom the fund should vest, of for such person, &c. as she

should appoint: *Francisca* afterwards married; and, on her marriage, her father advanced to her 500*l.*, and transferred to the trustees of her marriage settlement 900*l.* bank stock in trust for her separate use during her life; then for her husband during his life; and after his decease for the children of the marriage; but if she died in the lifetime of her husband without leaving any child, then to her husband absolutely; and if he died in her lifetime without leaving any child by her, to her absolutely: Held, that the provision made for *Francisca* on her marriage was an ademption of the legacies of 500*l.* and of 900*l.* bank stock.

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of anticipation or alienation; after her decease, for all and every or any one or more of her children in such shares as she should by deed or will appoint; in default of appointment, for all her children equally, who being sons should attain twenty-one, or being daughters should attain twenty-one or marry; in default of such children, for such trusts and purposes as she should by deed or will appoint; and in default of such appointment, for the person, who, at the time of her decease, would have been her next of kin, if she had died intestate and unmarried.

In the year 1829 *Francisca* intermarried with *Henry Treacher*; and upon that occasion the testator advanced to her 500*l.* in money, and transferred 900*l.* Bank stock into the names of the trustees of her marriage settlement. The trusts declared of the Bank stock by the settlement were, for *Francisca* during her life, to her separate use; then to her husband *Henry Treacher* for life; then to the children of the marriage as therein mentioned; but if *Francisca* died in the lifetime of her husband without leaving any child, then to *Henry Treacher* absolutely, and if he died in her lifetime without leaving any child by her, to *Francisca* absolutely.

One of the questions in the cause was, whether the legacies of the 900*l.* stock, and the 500*l.* sterling were adeemed or satisfied by the advance of 500*l.* on her marriage and the settlement which was then made of the 900*l.* stock.

On the one hand, it was contended that the two provisions were so essentially different, that the one could not be a satisfaction of the other. The interests in the 500*l.*, which were secured to the wife and her children by the will, were entirely annihilated, without any compensation

pensation to them, if the rule against double portions were applied here : and even as to the bank stock, the benefits, which the wife and children took under the settlement, were altogether different from and of much less value than those which they took under the will. The provisions made by the will extended to the children of any marriage which *Francisca* might contract; the settlement was confined to the children of the marriage with *Henry Treacher*.

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The argument on the other side proceeded chiefly on the language of the will, which, it was said, shewed clearly that the legacy was given as an equivalent for the portions which the other daughters had received, when they married; so that the legatee, having afterwards married in the lifetime of her father and received from him on that occasion a suitable portion, could not also claim the bequest which was manifestly intended to be a portion.

Mr. O. Anderdon, for the Plaintiffs.

Mr. Bickersteth, Mr. Pemberton, Mr. Tinney, Mr. Treslove, Mr. Coote, Mr. Duckworth, and Mr. Teed, for the different Defendants.

The MASTER of the ROLLS held that the legacies to *Francisca* and her children were adeemed by the provision made for her on her marriage.

“And his Honor doth declare that the legacies of 900*l.* Bank stock and 500*l.* given to the Defendant *Francisca Treacher*, by the will of the testator, have been redeemed.” — Reg. Lib. 1830. A. 1018.

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A testator, having under a settlement a power of appointing by will a sum of 7150*l.* bank stock, in respect of which three bonuses had been paid and invested since the date of the settlement, by his will, after mentioning the original amount of stock, and making an erroneous reference to the first bonus, as then consisting of 715*l.* 5 per cent. stock, appointed the said sum of 7150*l.* bank stock and the said sum of 715*l.* 5 per cent. bank an-

nualties, "together with all such further additions in the nature of profit to be made to the said bank stock in his lifetime:" Held, that the appointment extended to all the bonuses.

A testator, having a power under his marriage settlement to appoint a fund among his children, appointed it to his two sons and three daughters in equal shares, and then declared that the shares appointed to his daughters should be held on the same trusts for the benefit of his daughters and their issue as were therein expressed concerning the shares of his residuary estate bequeathed to each daughter and her issue: under these trusts the daughters took in their respective shares of the residue a life interest to their separate use, but without power of anticipation or alienation: Held,

That the shares of the settled fund were well appointed to the daughters absolutely, but to their separate use during their respective lives, and without power of anticipation or alienation:

That no case of election was raised in favour of the issue of the daughters against the daughters or their husbands.

By an indenture, dated the 16th of *January* 1799, which was executed in contemplation of the marriage of the testator *H. C. Bowles* and *Ann Garnault*, a sum of 7,150*l.* Bank stock, which had belonged to Mr. *Bowles*, was settled upon the husband and wife and the survivor of them for life; and after the decease of the survivor, upon trust to transfer the Bank stock unto, between, and amongst all and every the child and children, or such one or more child or children, or an only child of the said marriage, at such time or times, in such shares, proportions, manner and form, and with, under, and subject to such powers, provisos, conditions, restrictions, and limitations over (such limitations over to be for the benefit of some one or more of such children, or his, her, or their issue), as the said *H. C. Bowles* and *Ann Garnault* should, in manner therein mentioned jointly appoint; and for want of such joint appointment, as the survivor of them should, after the death of the other, by deed, or by his or her will, or any codicil thereto, direct or appoint; and in case of no such direction or appointment by them, or by the survivor of them, and as to so much whereof no such direction or appointment should be made, upon trust for all the children in equal shares, and if but one, then to such only child, and to be paid and transferred at the times therein mentioned.

The

The marriage took place; there were five children of the marriage, two sons, and three daughters: and the wife died in the lifetime of the husband without having joined in any appointment of the bank stock.

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In *June* 1799, there was paid in respect of the 7,150*l.* Bank stock, a bonus of 715*l.* five per cent. Bank annuities, which sum was transferred into the names of the trustees of the settlement; and in the following *December*, a memorandum, signed by the husband and wife, was indorsed on the settlement, by which it was declared that the 715*l.* five per cent. stock was to be subject to the trusts which the indenture declared concerning the bank stock. In the year 1802, a bonus in money was paid, which Mr. *Bowles* invested in the purchase of bank stock in the names of the trustees; and in *June* 1816, an addition of 25 per cent. was made to the stock by way of bonus. By these means, the Bank stock in the names of the trustees was augmented to 9,216*l.*

The will of *H. C. Bowles*, dated the 18th of *April* 1827, after reciting that, by his marriage settlement and the indorsement upon it, 7,150*l.* Bank stock, and 715*l.* five per cent. Bank annuities, being an addition made to the Bank stock in the nature of profit, were standing in the names of trustees in trust, after his decease, for all or any one or more of his children, and in such manner &c. as he should by will appoint, proceeded in the following words, — “ Now, in pursuance of the said power or authority to me given or reserved in and by my said marriage settlement, and by force and virtue thereof, and of every power or authority to me given or reserved, or enabling me in this behalf, I do, by this my last will &c., direct and appoint, give and bequeath the said sum of 7,150*l.* Bank stock, so mentioned in my said marriage settlement, and also the
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said sum of 715*l.* five per cent. Bank annuities, together with all such further additions in the nature of profit to be made to the Bank stock in my lifetime, unto my five children, *Henry Carrington Bowles, Ann Sarah Treacher, Jane Mary Reeves, Francisca Bowles, and John Bowles,* equally to be divided among them, share and share alike. But I do hereby will and declare, that one-fifth part or share, so appointed and bequeathed to each of my said three daughters, of and in the said 7,150*l.* Bank stock, and 715*l.* five per cent. Bank annuities, is so appointed and bequeathed, and I do hereby, so far as I lawfully or equitably may or can, order and appoint, that the same shall be held and applied by my executors and trustees hereinafter named, upon and for the same trusts, intents and purposes, for the benefit of each of my said daughters and their issue, as are hereinafter expressed and directed of and concerning the one-fifth part or share hereinafter bequeathed in favour of each such daughter and her issue, of and in my residuary personal estate." These trusts were the trusts stated in the former part of this report. The will also contained a proviso "that no child, taking a share under any such appointment as aforesaid, shall be entitled to any further or other share of and in the remaining or unapplied part or parts of the said one fifth part, unless and until he or she have brought his or her appointed share into hotchpot, and shall have accounted for the same accordingly."

At the date of the will, the 715*l.* five per cents had been converted into a larger amount of 3 per cent. stock.

Under these circumstances the following questions were raised.

I. Whether

I. Whether the appointment extended to the bonuses of 1802 and 1816, or was confined to the original sum of 7,150*l.* Bank stock, and the stock into which the 715*l.* five per cent. Bank annuities were converted.

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Mr. *Tinney* and Mr. *Tedd* argued that, by the express words of the will, the appointment was limited to the original amount of stock and the first bonus, and to such additions by way of bonus as might be made after the date of the will; and that there were no words which could be fairly extended to the intermediate bonuses.

The MASTER of the ROLLS was of opinion that the erroneous allusion in the will to the 715*l.* as an existing five per cent. stock, though it had been long converted into a different amount of a different stock, shewed that the testator was not acquainted with the particulars of which the accumulated fund consisted, and that his intention was to appoint the whole of that fund which was vested in the trustees of the settlement.

II. As the appointment was bad so far as it attempted to create trusts in favour of the children of the daughters, the grandchildren of the testator not being within the objects of the power, a second question was, whether the shares were well appointed to the daughters absolutely, or whether after the life estates given to the daughters, these shares were to be considered as unappointed.

If the shares were well appointed to the daughters absolutely, another question was, whether the restriction against anticipation or alienation and the limitations to the separate use of the daughters during their lives were valid, having regard to the terms of the power contained in the settlement.

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The MASTER of the ROLLS held that the words of appointment were sufficient to vest the shares absolutely in the daughters; that the attempt to restrict their interest by limitations to their issue, being inoperative, did not cut down the absolute appointment; but that it was competent to the donee of the power to limit the interests, which he appointed to his daughters, to their separate use and to restrain them from anticipation or alienation.

III. It was then contended on behalf of the issue of the daughters, that, as the testator had manifested a plain intention that the children of the daughters should take interests in the settled fund, and as, by the same instruments, he gave to his daughters shares of his residue, a case of election was raised against the daughters; and the daughters were bound to elect between giving effect to the appointment in favour of their children and the interests which they, the daughters, took under the will: *Whistler v. Webster.* (a)

The MASTER of the ROLLS held that, the testator having made an absolute appointment in the first instance, no case of election was raised.

Declare that the original fund of 7,150*l.* Bank stock, in the indenture of the 16th of *January* 1799 mentioned, and all the additions in the nature of profit which have been made thereto, are well appointed by the will of *H. C. Bowles* to the Defendants *Henry C. Bowles, John Bowles, Ann Sarah Treacher, Jane M. Reeves, and Francisca Treacher*, the testator's children, in equal shares, and that, subject to the limitations and restrictions hereinafter

(a) 2 *Ves.* jun. 367.

after mentioned, *E. T. Treacher* and *Ann Sarah* his wife in her right, *J. Reeves* and *Jane Mary* his wife in her right, and *H. Treacher* and *Francisca* his wife in her right are absolutely entitled each to one-fifth share of such trust fund and additions, but that the shares appointed to *Ann Sarah Treacher*, *Jane Mary Reeves*, and *Francisca Bowles* are limited to their respective separate use for life, independent of any present or future husband, and are to be held and enjoyed by them without power to make any assignment or appointment by way of alienation."—Reg. Lib. 1830, A fol. 1018.

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1832.

June 25.

LLOYD v. HARVEY.

The testator, upon the marriage of a daughter, entered into a bond for the payment of 5000*l.* within six months after his decease to the trustees of his daughter's settlement, the interest to be paid to the husband for life; and after his decease, if the wife survived him, and there were children of the marriage, 1000*l.*, part of the 5000*l.*, to be paid to the wife, and the remainder to be applied for the use of the children of the marriage; but if

THE late Admiral Sir *Eliab Harvey*, upon the marriage of the Plaintiff *William Lloyd* with the co-plaintiff *Louisa* his wife, who was Sir *Eliab's* eldest daughter, entered into a bond for securing to the trustees of the settlement the payment of a sum of 5000*l.* within six months after his decease, with interest for the same from the day of his death, at the rate of 5 per cent.

By the marriage settlement of Mr. and Mrs. *Lloyd*, bearing date the 2d of *October* 1804, the interest of the said sum of 5000*l.* was given to the Plaintiff, the husband, for life; and after his decease, if the wife should survive him, and there should be issue of the marriage, the trustees were to pay the sum of 1000*l.* to the wife, and were to apply the remainder, or in case the husband should survive the wife, then the whole of the 5000*l.*, to the use of the children of the marriage in manner therein-mentioned; but in case there should be no children of the marriage who should attain a vested interest in the sum of 5000*l.*, and the wife should survive the husband, then they were to

pay

there were no children, 2000*l.* to be paid to the wife, and the remainder of the 5000*l.* to be paid to the executors and administrators of the husband; and in case the husband survived the wife, and there were no children, then the whole of the 5000*l.* to the husband. The testator afterwards made his will, and gave his daughter 5000*l.*, stating it to be in addition to what he had secured upon her marriage. About five years afterwards the testator executed a deed whereby he covenanted that his executors should pay to the trustees within six months after his death, the sum of 5000*l.* upon the trusts of the settlement. Parol evidence of the declarations of the testator was admitted to prove that he did not intend a double portion.

Quære, Whether the different interests of the husband, wife, and children in the legacy of 5000*l.*, and in the sum of 5000*l.* given by the deed, would repel the common presumption against double portions?

pay the sum of 2000*l.* to the wife, and the remainder of the 5000*l.* to the executors and administrators of the husband, or in case the husband should survive the wife, and there should be no child of the marriage who should attain a vested interest in the 5000*l.*, then the whole of such sum to the husband, his executors and administrators.

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The testator had five daughters, and his will, bearing date the 9th of *June* 1818, was partly in the following words: — “ And whereas, upon the marriage of my daughter *Louisa Lloyd*, I secured to the trustees of her marriage settlement the sum of 5000*l.*, of which I have since paid 2000*l.*; now I give and bequeath to my said daughter *Louisa Lloyd* the sum of 5000*l.* in addition to what I secured upon her marriage as aforesaid. And whereas, upon the marriage of my daughter *Georgiana Drummond*, I paid the sum of 2000*l.* and secured the further sum of 8000*l.* as her portion to the trustees of her marriage settlement, therefore it is not my intention to make any further bequest by this will to my said daughter *Georgiana Drummond*. And I give and bequeath the sum of 10,000*l.* to each of my daughters *Emma Harvey*, *Maria Harvey*, *Elizabeth Harvey*, and *Mary Harvey*: and I direct the said several sums of 10,000*l.* to be paid to my said daughters respectively within six calendar months after my decease, with interest for the same after the rate of 4*l.* 10*s.* per cent. per annum from the day of my decease.” The testator by the same will devised his real estates to his only son in fee; and in case his son should die under twenty-one, then all his daughters, who survived the son, were to succeed to the real estates as tenants in common in fee.

The son died under twenty-one in *March* 1823.

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By an indenture bearing date the 18th of *June* 1823, to which the testator, the Plaintiff *William Lloyd*, and two trustees, were parties, and which was indorsed on the back of the settlement, after reciting that the testator was minded and desirous from love and affection for his daughter *Louisa*, the wife of the said *William Lloyd*, to make such further provision for them and their issue as therein-after mentioned, the testator covenanted with the trustees that his heirs, executors, and administrators should, within six months after his decease, pay to the trustees the sum of 5000*l.* with interest for the same after the rate of 4*l.* 10*s.* per cent., upon the same trusts as by the indenture of settlement were declared concerning the sum of 5000*l.* therein mentioned.

On the 11th of *February* 1830, the testator made a codicil to his will in the following words: — “This is a codicil to be added to and taken as part of the last will and testament of me, Sir *Eliab Harvey* of *Rolls* in the parish of *Chigwell* in the county of *Essex*, K. G. C. B., which will bears date the 9th day of *June* 1818. Whereas, upon the marriage of my daughter *Maria Tower*, I secured to the trustees of her marriage settlement the sum of 10,000*l.* as her portion; and whereas, in contemplation of the intended marriage of my daughter *Emma Harvey* with Colonel *William Cornwallis Eustance*, I have invested the sum of 2000*l.* in the funds in the names of the trustees of her marriage settlement, and have this day executed a bond for securing to the same trustees a further sum of 8000*l.*, making together the sum of 10,000*l.* as the portion of my said daughter *Emma Harvey*; — Now, therefore, I do hereby declare that the portions, so provided by me for the benefit of my said two daughters respectively as aforesaid, are to be considered as in lieu of the legacies
of

of 10,000*l.* given and bequeathed by my said will to each of my said two daughters respectively; and I do hereby revoke the said legacies of 10,000*l.* given to each of my said two daughters *Maria Tower* and *Emma Harvey* respectively: but I do hereby declare that the said legacy of 10,000*l.* given and bequeathed by my said will to my daughter *Emma Harvey* is hereby revoked only in the event of the said portion, provided for her by me on her now intended marriage, becoming payable by the said marriage being duly had and solemnized."

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The testator died on the 20th of *February* 1830.

The bill was filed by the Plaintiffs, *William Lloyd* and *Louisa* his wife, claiming to be entitled to the sum of 5000*l.* mentioned in the indenture of the 18th of *June* 1823, and also to the legacy of 5000*l.* given to the Plaintiff *Louisa* by the will: and the only question in the cause was, whether the 5000*l.* mentioned in that indenture was or was not an ademption of the same sum given by the will.

Miss Perceval, a friend of the family, who was examined as a witness, gave the following evidence:—
 "That she was extremely well acquainted with the testator, *Sir Eliab Harvey*, from her earliest recollection until his death, and was upon the most intimate and familiar terms of friendship with him and his family up to that event, and in the habit of constant intercourse with him and them; that she was staying with him at his house for the last month of his life; that the testator in his last illness was frequently in the habit of sending for her into his room, where he was confined by illness, and of conversing with her very freely respecting his property and affairs, and the disposition

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he intended to make of his property by his will; that she could not at the time of her examination call to mind any particular conversation with the testator or any communication of his respecting the disposition of his property amongst his daughters that had been impressed upon her memory, except one which she had a perfect recollection of, and which was to the following effect:—In the course of one of the general conversations with the deponent respecting his property, the testator took occasion to state to the deponent, that it was his intention to make an equal distribution of his property amongst his daughters, and that he entertained an equal affection for them all, and intended not to shew any preference towards one above any of the others, nor to give Mrs. *Lloyd* a larger share because she was the eldest, but that it was his wish and intention that his daughters should all take an equal share in his property, or the testator expressed himself in terms to that effect;—that this conversation occurred in the course of the testator's last illness, and, as near as she could recollect, about three weeks before his death."

Mr. *Pemberton* and Mr. *Stuart*, for the Plaintiffs.

Mr. *Bickersteth* and Mr. *Tinney*, for the Defendants.

Both on the general question, and on the point of the admissibility of the parol evidence, *Weall v. Rice* (a) and *Booker v. Allen* (b) were referred to, and the leading authorities which were cited in these cases. The Plaintiffs relied also on the circumstance, that the testator, after he made a settlement on *Maria Tower* and his daughter *Emma*, executed a formal codicil, for the express purpose of declaring that the portions so provided

(a) p. 251. *suprà*.

(b) p. 270. *suprà*.

or these daughters were in lieu of the legacies bequeathed by the will; and it was argued, that if he entertained the same intention with respect to the residue, he would have manifested it in the same or a similar manner.

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The will could receive the construction which has been intended for by the counsel of the Defendants, and it could be considered that the legacy of 5000*l.* was upon the trusts of the settlement, there would be no question of all question, and the common presumption would apply, that the legacy of 5000*l.* was adeemed by the 5000*l.* mentioned in the indenture of the 18th of June 1823. It is probable that such might be the intention of the testator, but it does not appear to me that he has sufficiently expressed such intention. It is, therefore, insisted for the Plaintiffs, that the daughter, or her husband in her right, would have taken the legacy of 5000*l.* unfettered by the trusts of the settlement; and that it cannot be adeemed by the 5000*l.* by the indenture of the 18th of June 1823 upon the trusts of the settlement, because, by the settlement, the daughter surviving her husband would take only one part of the 5000*l.*, if there were children of the marriage, and only 2000*l.*, if there were no children of the marriage. It is, however, to be observed, that the sums of 5000*l.* are given as additions to the portions of the daughter, and are provisions for the family, and that in that respect have the same character; and, relative to the case of *Trimmer v. Bayne* (a), it appears to be questionable, whether the different interests of the daughter and children in the two sums would defeat the objection which is raised against double portions.

If,

(a) 7 *Ves.* 508.

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If, however, by reason of such differences the common presumption be not admissible in this case, there is evidence which establishes that it was not the intention of the testator to give both sums. The will itself manifests, that it was the intention of the testator that all his daughters should benefit equally by his bounty; the same sum of 10,000*l.* is in effect provided for each of the six daughters; and in the event of the son dying under twenty-one, all the daughters who may be then living are to succeed to his real estate in equal shares.

I consider the codicil as rather confirming than repelling the presumption that the testator intended equality amongst his daughters. The marriages of the two daughters mentioned in it had been recent; and the indenture of 1823, having been made seven years before, might well not be present to his memory.

The evidence of Miss *Perceval* appears to me to be admissible, not upon the ground of fortifying or repelling a presumption, but as extrinsic evidence that it was not the intention of the testator to make a double provision for his daughter *Louisa*.

The bill, therefore, must be dismissed, but without costs.

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SHEFFIELD v. The Earl of COVENTRY.

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1833.

April 17.

THE late Earl of *Coventry*, in contemplation of a marriage between his daughter *Lady Sophia* and *Sir Roger Gresley*, executed a bond, dated the 19th of *May* 1821, in the penal sum of 20,000*l.* to Lord *Deerhurst* and *John Scudamore*, the intended trustees in *Lady Sophia's* marriage settlement, in which the condition was as follows:—“Now the condition of the above written obligation is such, that if the said intended marriage between the said *Sir Roger Gresley* and *Lady Sophia Coventry* shall not be duly solemnised within the space of twelve calendar months, to be computed from the date of the above written obligation; or in

A testator, upon the marriage of a daughter, entered into a bond conditioned for the transfer to the trustees of her settlement, during his life, or within twelve months after his decease, of 10,000*l.* 4 per cent. bank annuities; the only case 4 per cent. bank an-

nuities then existing were afterwards reduced to 3½ per cents.; but there was existing at the time of his death a new 4 per cent. stock, which had been created two years after the reduction of the old 4 per cents:—the bond is satisfied by a transfer of 10,000*l.* 3½ per cents.

The same testator by his will gave to a son a legacy of 20,000*l.* in “the joint stock of the 4 per cent. bank annuities, transferable at the Bank of *England*, commonly called four per cent. bank annuities:” the only 4 per cent. bank annuities existing at the date of his will were reduced to 3½ per cents.; afterwards, and before his death, a new stock of 4 per cent. bank annuities was created:—the will speaks at the testator's death, and the son is entitled to a sum of 20,000*l.* in the then existing 4 per cent. bank annuities.

A testator by his will gave to his daughter *Sophia* and her children, under certain circumstances, a sum of 10,000*l.* 4 per cent. annuities, and directed that, with the exception of certain sums, of which this was not one, and which were expressly ordered to be brought into hotchpot, the legacies bequeathed to any of his children were to be, not in satisfaction of, but in addition to any portion or provision to which they were or should be entitled under any articles or settlement then already executed by him; afterwards, upon her marriage, a sum of 10,000*l.* 4 per cent. bank annuities was settled upon *Sophia*, her husband, and her children:—she is not entitled to both provisions, notwithstanding the differences in the limitations.

The testator, on the marriage of another daughter without his consent, revoked a bequest of 10,000*l.* 4 per cent. bank annuities which he had made by the same will in favour of that daughter and her children, and gave her a life-interest in a sum of 5000*l.* 4 per cent. bank annuities; he afterwards settled 10,000*l.* on her and her children, and by a codicil declared the settlement to be in satisfaction of the legacy:—this circumstance, even coupled with the difference of the provisions, and the language of the will, is not sufficient to repel the presumption against double portions in the case of the daughter *Sophia*.

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case such marriage shall be duly solemnised within the space of twelve calendar months, computed as aforesaid, and the said *George William* Earl of *Coventry* shall, at any time thereafter during his life, or the heirs, executors, or administrators of the said *George William* Earl of *Coventry*, within the space of twelve calendar months next after his decease, transfer or cause to be transferred into the names or name of the said Lord Viscount *Deerhurst* and *John Scudamore*, or the survivor of them, or the trustee or trustees for the time being of the said indenture of settlement, bearing even date with the above written obligation, the sum of 10,000*l.* four per cent. bank annuities in the books of the Government and Company of the Bank of *England* kept for entering transfers of such stock; and if the said *George William* Earl of *Coventry*, his heirs, executors, or administrators, shall and do in the meantime, until such transfer is made as aforesaid, well and truly pay or cause to be paid to the said Lord Viscount *Deerhurst* and *John Scudamore*, or the survivor of them, or such other trustee or trustees for the time being as aforesaid, the annual sum of 400*l.* of lawful money of *Great Britain*, being the amount of the yearly dividends payable in respect of the said 10,000*l.* 4 per cent. bank annuities, on or at the respective days or times when the dividends of that stock shall be payable at the Bank of *England*; then and in either of such cases the above written obligation shall be void, otherwise shall be and remain in full force and virtue."

The settlement referred to was of even date with the bond, and made a provision for Lady *Sophia* and the children of the marriage out of Sir *Roger Gresley's* real estates. As to the 10,000*l.* four per cent. bank annuities secured by the bond, and the 400*l.* a year which
 Lord

Lord *Coventry* was to pay till the stock was transferred, the trustees were, during the joint lives of Sir *Roger* and Lady *Sophia*, to pay 200*l.* a year, part of the 400*l.*, to Lady *Sophia*, for her separate use, by way of pin money, and the remaining 200*l.* a year to Sir *Roger Gresley*. After the death of either, the whole 400*l.* a year was to be paid to the survivor; and upon his or her death, the capital was to go to the children of the marriage, as the parents jointly or the survivor should appoint, and, for want of such appointment, to the children equally in manner therein mentioned.

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The marriage between Lady *Sophia* and Sir *Roger Gresley* was immediately solemnised. In the year 1824, the 5 G. 4. c. 11. reduced the only 4 per cent. bank annuities, which existed at the date of the bond, to 3½ per cent. bank annuities: and it was thereby provided (a), that all bonds and contracts for the transfer of the 4 per cent. bank annuities should be fully satisfied by the transfer of an equal sum in the new 3½ per cent. annuities.

In

(a) The sixteenth section of the 5 G. 4. c. 11. provided, "That in every case in which any person or persons shall at the time of the passing of this act be or remain bound by the condition of any bond or obligation, or by the terms of any instrument in writing, or by any agreement or contract, to transfer any amount of capital stock in the said 4 per cent. annuities respectively, the condition of every such bond or obligation, or the terms of any such instrument in writing, or agreement or contract, shall be deemed in law and equity to be satisfied, by making a transfer of an equal amount of capital stock

in the reduced 3½ per cent. annuities; and that where any party is by the condition of any such bond or obligation, or the terms of any such instrument in writing, or agreement or contract, bound or required to pay half yearly sums, equal to the dividends, on any specified amount of any such 4 per cent. annuities respectively, every such bond, obligation, instrument, agreement or contract, shall be satisfied by the payment of half yearly sums equal to the dividends of or upon the same amount of the said 3½ per cent. annuities."

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In the year 1822, the 5 per cent. bank Navy annuities were by the 3 G. 4. c. 9. reduced to 4 per cent. annuities; and in the year 1830, these latter annuities were reduced by the 11 G. 4. and 1 W. 4. c. 13. to a $3\frac{1}{2}$ per cent. fund.

The 7 G. 4. c. 39., which received the royal assent on the 5th of *May* 1826, created a new stock called 4 per cent. bank annuities of 1826, which was not to be redeemable till after the 5th of *April* 1838.

The Earl of *Coventry* died on the 25th of *March* 1831, having during his life duly paid to the trustees of Lady *Sophia's* marriage settlement 400*l.* a year according to the condition of the bond, but not having made any transfer of stock to them.


The first question in the cause was, whether the condition of the bond was to be satisfied by a transfer of the sum of 10,000*l.* in the $3\frac{1}{2}$ per cent. bank annuities, to which the 4 per cent. annuities existing at the date of the bond had been reduced, or by a transfer of 10,000*l.* in the new 4 per cent. annuities, which did not exist at the date of the bond, but existed at the death of the Earl of *Coventry*.

Mr. *Pemberton* and Mr. *Lowndes*, for the Plaintiffs, who were trustees and executors.

Mr. *Tinney* and Mr. *Spence*, for Sir *Roger* and Lady *Sophia Gresley*.

By the words of the bond, Lord *Coventry* was bound at the time of his death to transfer to the trustees of Lady *Sophia's* settlement 10,000*l.* four per cent. bank annuities; there existed at that time and there exists now a 4 per cent. stock; and there is no reason why the

the condition should not be fulfilled literally. The obligor and his representatives were allowed to discharge their obligation at any time not exceeding a year from his decease; but at whatever time the obligation was to be discharged, it could be done only by a transfer of stock which at the time bore 4 per cent. interest. The case does not come within the sixteenth section of the 5 G. 4. c. 11.; for that clause applies only to bonds and contracts "to transfer any amount of capital stock in *the said* 4 pounds per centum annuities." Here the instrument has no reference to any particular species of stock as existing at any time except the time of transfer. It is clear that the intention was, that the trust fund should produce 400*l.* a year, at least during the joint lives of Sir *Roger* and Lady *Sophia*, and during the life of the survivor of them: and that intention will be entirely disappointed, if the bond is held to be satisfied by a transfer of 10,000*l.* 3½ per cent. stock.

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Mr. Bickersteth and Mr. James Russell, contra.

The only 4 per cent. bank annuities which existed at the date of the bond, or for some time afterwards, were the annuities which were reduced by the 5 G. 4. c. 11. That must, therefore, have been the stock which the bond contemplated, unless it is to be held that Lord *Coventry* was bound by a contract which had no reference to any existing subject. The condition of the obligation speaks of "the books of the Governor and Company of the Bank of *England*, kept for entering transfers of such stock"; and the half yearly payment of 200*l.* until the stock is transferred, is to be made "at the respective days or times when the dividends of that stock shall be payable at the Bank of *England*." These expressions have a plain reference to an actually existing stock. Lord *Coventry*, therefore, was a person, who, at the time of the passing of the 5 G. 4. c. 11., was bound to transfer
 at

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at some future time a given amount of the capital of the bank annuities which that act reduced; and his obligation is satisfied by transferring an equal amount of the $3\frac{1}{2}$ per cent. stock.

The MASTER of the ROLLS.

I am of opinion that the condition of the bond plainly referred to a sum of 10,000*l.* in the 4 per cent. bank annuities then in existence, and that, according to the express provision of the 5 G. 4., this contract will be fully satisfied by a transfer of 10,000*l.* three and a half per cent. bank annuities, into which the 4 per cent. bank annuities were by that statute reduced.

The Earl of *Coventry* made his will dated the 8th of *July* 1818, which was partly in the words following:—"As to, for, and concerning all the rest and residue of my personal estate and effects whatsoever not herein-before by me otherwise disposed of, and all such sum or sums of money as are herein-before directed to become and constitute part thereof, I give and bequeath the same and every part thereof unto Sir *Robert Sheffield* and *Henry Pitches Boyce*, their executors, administrators, and assigns, upon the trusts and for the intents and purposes by this my will expressed and declared of and concerning the same (that is to say), upon trust that my said trustees or the survivor of them, or the executors, administrators, or assigns of such survivor, do and shall appropriate and apply so much thereof as shall be requisite for that purpose (after deducting all expenses) in the purchase of 20,000*l.* interest or share in the capital or joint stock of the annuities transferable at the bank of *England*, commonly called 4 per cent. bank annuities." Then, after declaring the trusts of this sum of stock

for

for two of his daughters, the will proceeded thus: “ And upon further trust that my said trustees or the survivor of them, or the executors, administrators, and assigns of such survivor, do and shall, out of the said residue of my said personal estate (after the application of part thereof as herein-before directed), appropriate and set apart so much thereof as will be sufficient to purchase the further sum of 20,000*l.* interest or share in the capital or joint stock of the said annuities transferable at the Bank of *England* commonly called 4 per cent. bank annuities, and do and shall stand and be possessed of and interested in the same bank annuities, when so purchased as aforesaid, and receive the dividends, interest, and annual produce thereof, and pay, apply, and dispose of the same, during the life of my son *John Coventry*, to such person or persons, and for such intents and purposes and in such manner, as my said son shall from time to time by any draft, note, order, or writing signed by him (but not by way of anticipation) direct and appoint, and in default of or subject to any such direction or appointment do and shall pay such interest, dividends, and annual produce into the proper hands of my said son for his sole use and benefit during his lifetime,” subject to various provisos, and with various limitations over.

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At the date of the will there were no other 4 per cent. bank annuities than those which were reduced to 3½ per cent. annuities in 1824, by the 5 G. 4. c. 11.

The twentieth section of the 5 G. 4. c. 11. (*a*), provided that trusts, affecting the 4 per cent. bank annuities

<p>(<i>a</i>) That section enacted, “ That all trusts, whether created by will or otherwise, and which existed either in the whole or in part,</p>	<p>and all directions contained in any will or devise or testamentary paper which remain unexecuted at the time of the passing of</p>
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nuities thereby converted, should be satisfied by an equal amount of the new $3\frac{1}{2}$ per cents.

The Earl of *Coventry* afterwards made a codicil to his will, bearing date the 21st day of *July* 1818, and a second codicil to his will bearing date the 11th day of *July* 1825, but did not by either of them alter or affect the legacy of 20,000*l.* given by the will for the benefit of his son *John Coventry*. The only 4 per cent. annuities, which existed at the date of the last codicil, were the new 4 per cent. annuities, which had arisen in *July* 1822, from the conversion of the Navy 5 per cents. under the 3 G. 4. c. 9.

The second question in the cause was, whether this legacy was to be satisfied by a transfer of the sum of 20,000*l.*, $3\frac{1}{2}$ per cent. bank annuities, into which the 4 per cent. bank annuities existing at the date of the will had been reduced; or by a transfer of 20,000*l.* of the 4 per cent. bank annuities, existing at the death of the Earl of *Coventry*.

Mr. *Lynch*, for *John Coventry*.

The question is not affected by the decision of the Court on the bond. The bond has reference to the state of

of this act, as to any 4 per cent. annuities which may under this act be converted into $3\frac{1}{2}$ per cent. annuities, or as to the payment or distribution of any dividends thereon, or as to the transfer of any such annuities in any events specified in any such trusts or will or testamentary paper, shall extend and be deemed and construed in all cases and in all courts of law and equity in the United King-

dom, or elsewhere in any dominions or territories belonging to his majesty, to extend and to apply to all such $3\frac{1}{2}$ per cent. annuities, created in lieu of any 4 per cent. annuities, subject to or affected by any such trusts or devises or wills or testamentary papers, for all purposes, and in all cases in which such trusts or to which any such directions can be made applicable."

of things which existed at the time of it's execution; the will speaks at the death of the testator, and must mean 4 per cent. stock then existing: *Banks v. Sladen.* (a)

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Mr. *Bickersteth* and Mr. *James Russell*, *contra*.

The will must be read with reference to the state of things at the time when it was made. It speaks — not of any stock to be afterwards created — but of a stock which then existed; and it describes it as a stock “transferable at the Bank of *England*, commonly called 4 per cent. bank annuities.” The only stock then transferable at the Bank of *England*, which was commonly called 4 per cent. bank annuities, was the stock which has been since reduced to $3\frac{1}{2}$ per cents. The present 4 per cents. had no existence and no appellation at the time when the testator made his will. The trust may also be considered as an inchoate trust, remaining unexecuted at the time when the 5 G. 4. c. 11. was passed; and if so, it will come within the operation of the twentieth section.

Mr. *Lynch*, in reply.

The wills spoken of in the twentieth section of the 5 G. 4. c. 11. are wills of testators then dead, which were operative instruments, and had created trusts affecting the stock about to be reduced, but which had not been executed. The will of Lord *Coventry* did not, until his death, create any trust which could affect any species of stock whatsoever.

The MASTER of the ROLLS.

Upon the second question, I am of opinion, that the testator's son *John* is under the will entitled to a sum of 20,000*l.* stock in the 4 per cent. bank annuities now existing.

(a) 1 *Russ. & Mylec*, 216.

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isting. This is not, like the case of *Lady Sophia*, a case of contract. The will speaks only at the death of the testator; and the plain intention is to provide for the son *John* an income of 800*l.* a year, by the purchase at the testator's death of 20,000*l.* in 4 per cent. bank annuities. The 3½ per cent. bank annuities would not sufficiently answer his clear intention, nor the description in the will.

If his intention could be confined to the 4 per cent. bank annuities existing at the date of the will, it might be argued that the legacy was altogether adeemed, inasmuch as there is now no such stock.

The trusts of the first mentioned sum of 20,000*l.* 4 per cent. bank annuities, which the trustees were directed to purchase, were declared in the following words: — “ I direct that the said sum of 20,000*l.* 4 per cent. Bank annuities, when so purchased, shall be transferred into the names of the trustees for the time being of this my will, and that they do and shall stand and be possessed of or interested in one moiety or half part thereof, in trust for my said daughter *Lady Barbara Coventry*, and the same shall become and be an interest vested in, and shall be transferred or assigned to my said daughter *Lady Barbara Coventry*, when and as soon as she shall attain the age of twenty-five years, or be married under that age with the consent of my said wife during her life, and after her decease, then of the trustee or trustees for the time being of this my will, which shall first happen; and during such time as my said daughter *Lady Barbara Coventry* shall be under the age of twenty-five years and unmarried, I direct that my said trustees or trustee do and shall pay and apply one moiety or equal half part of the dividends, interest,

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interest, and annual produce of the said 10,000*l.* 4 per cent. Bank annuities unto my said wife for and towards the maintenance and education of my said daughter, and do and shall pay and apply the other moiety or equal half part of such last mentioned dividends, interest, and annual produce unto my said daughter for clothing and for such other articles of dress and necessities as she shall or may require ; and in case my said wife shall die before my said daughter shall attain the age of twenty-five years, or be married with such consent as aforesaid, then I direct that my said trustees or the trustee for the time being of this my will, do and shall pay the whole of the dividends, interest, and annual produce of her said portion unto my said daughter to and for her own use and benefit: but if my said daughter shall die under the age of twenty-five years, and unmarried, then I direct that the said sum of 10,000*l.* 4 per cent. Bank annuities hereby bequeathed to or in trust for her shall fall into and constitute part of the residue of my personal estate: provided always, that if my said daughter shall die unmarried before she shall attain the age of twenty-five years without such consent as aforesaid, then I do hereby declare my will to be, that the several trusts by this my will declared, respecting the said 10,000*l.* 4 per cent. Bank annuities, shall be void; and in lieu thereof, I direct that my said trustees, or the survivor of them, or the executors or administrators of such survivor, do and shall (after such marriage shall be had and solemnized) stand and be possessed of and interested in the capital of the said Bank annuities, upon trust that they do and shall receive the interest, dividends, and yearly produce of the same from time to time during the life of my said daughter, and do and shall pay, apply, and dispose of the same to such person or persons, for such purposes, and in such manner as she, notwithstanding her coverture,

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shall from time to time by any draft, note, order, or writing, signed by her, but not by way of anticipation, direct and appoint; and in default of or subject to any such direction and appointment, do and shall pay such interest, dividends, and annual produce into the proper hands of my said daughter for her own sole and separate use and benefit, exclusive of her then present or any future husband, who is not to intermeddle therewith, nor is the same to be subject or liable to his debts, engagements, or control: and my will is, that any draft, note, order, or receipt in writing, signed by my said daughter, shall, notwithstanding her coverture, be a sufficient discharge for so much money, as in any such draft, note, order, or receipt shall be acknowledged to be received, to the persons or person paying the same; and from and after the decease of my said daughter, then upon further trust, that my said trustees, or the survivor of them, or the executors, administrators, and assigns of such survivor, do and shall stand and be possessed of and interested in the said sum of 10,000*l.* 4 per cent. Bank annuities, and all dividends, if any, which shall have accrued thereon respectively after the decease of my said daughter, in trust for all and every the child or children of my said daughter, to be divided between them in equal shares and proportions, if more than one, and if but one such child, in trust for such one child; the shares of sons to be transferred and paid to them at their respective ages of twenty-one years, and the shares of daughters to be paid to them at that time, or day or respective days of marriage, which shall first happen: and it is my will, that if any of the children of my said daughter, being a son or sons, shall die under the age of twenty-one years, or, being a daughter or daughters, shall die under that age and unmarried, the shares or share of such children or child so dying shall go over, and be paid and divided amongst

amongst the surviving children, in equal shares and proportions, if more than one, and if but one child, then to such one child, and shall be payable in the same manner and be transferable at the same times as I have hereinbefore mentioned with respect to the original provision hereby made for such children respectively: and it is my further will, and I do direct that in case my said daughter shall be married without such consent as aforesaid, and shall leave any children or an only child at the time of her death, my said trustee, or the trustees or trustee for the time being of this my will, do and shall, during the minority of such children or child, pay and apply the whole or a sufficient part of the dividends and interest to accrue on the shares or share of such children or child in and towards the maintenance and education of such children or child respectively, and do and shall, when and so often as the whole of such interest, dividends, and annual produce shall not be so applied as aforesaid, lay out and invest the same in the purchase of like Bank annuities, and add the interest thereof from time to time to the principal by way of accumulation (such accumulation to be for the benefit of such child or children, and to be transferred and become vested interests at the same age or ages, and to be liable to the same chance of survivorship as hereinbefore declared respecting the principal of such Bank annuities): provided always, and my will is, that notwithstanding the trusts aforesaid, it shall be lawful for my said trustees, or the survivor, or the executors, administrators, and assigns of such survivor, after the decease of my said daughter (if they or he shall think fit, but not otherwise), at any time or times during the minority of any child or children pre-umptively entitled to any shares or share of and in the portion hereby provided for my said daughter (being a son or sons), to call in any part of the capital out of which the share or

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shares of any such son or sons shall be presumptively payable, but not exceeding in the whole for each and any such son one half of his presumptive portion at the time, and to apply the monies so to be called in for placing any such son or sons in any profession or employment, or for his or their instruction therein, or otherwise for his or their advancement in the world, notwithstanding his or their portion or portions shall not have then become payable: and my will further is, that in case all the children of my said daughter shall die without having acquired a vested interest or vested interests in the capital of the said Bank annuities, then and in such case I direct that the same shall sink into and form part of the general residue of my said personal estate, and be applied and disposed of accordingly. And as, to, for, and concerning the sum of 10,000*l.* 4 per cent. Bank annuities (the remaining part of the said sum of 20,000*l.* like annuities) hereinbefore directed to be raised out of my said personal estate, upon trust that my said trustees, or the survivor of them, or the executors, administrators, or assigns of such survivor, do and shall stand and be possessed of and interested in the same, and of and in the dividends, interest, and annual produce from time to time to arise therefrom in trust for my said daughter Lady *Sophia Coventry* and her issue, the same to become an interest vested in and to be assigned and transferred to her and her issue at such or the like ages or times, in such or the like shares and proportions, and in such or the like events, and to be subject to such or the like trusts, provisos, and declarations as I have hereinbefore expressed and declared of and concerning the like portion hereby provided for my said daughter Lady *Barbara Coventry* and her issue." The testator, in a subsequent clause, gave the residue of his personal estate in trust for his children (except his

his son Lord *Deerhurst* and his son *John*), and their issue, in manner therein mentioned. Then came the following proviso: — “ Provided, and I do hereby further direct, that whatever sum and sums of money I have already paid or advanced, or may hereafter pay or advance to or for the use of any of my children in my lifetime, for which I have already taken or shall hereafter take any acknowledgment in writing, shall be brought into hotchpot before any division shall be made of my said residuary estate and effects, or otherwise the same shall be received, taken, or allowed as part of the share or provision of my said residuary estate and effects, to which the child or children, to or for whose use or benefit such advance or payment has been or shall be made*, unless I shall by some codicil hereto, or other writing under my hand hereafter, give any directions to the contrary.” After various other directions, the will proceeded as follows: — “ And I do hereby further declare my will to be, that the legacies and benefits hereinbefore bequeathed by me to or in favour of my said children, or any of them, shall not be in satisfaction for, but in addition to, any portion or provision to which they are or shall be entitled under any articles or settlement already executed by me in their favour, other than and except such sums as are hereinbefore directed to be brought into hotchpot as aforesaid.”

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On the 20th *July* 1818, the testator's daughter, Lady *Barbara*, intermarried with Mr. *Crawfurd*, without her father's consent. Upon this, Lord *Coventry*, by a codicil dated the 25th day of *July* 1818, revoked the legacy of 10,000*l.* four per cent. Bank annuities, and all other benefits given by his will to Lady *Barbara* and her

* The sentence is imperfect ; it is printed as it was in the briefs.

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her issue, and he thereby gave to her, in lieu of his former bequest, a sum of 5000*l.* four per cent. Bank annuities, for her life only. Afterwards, by a deed bearing date the 9th day of *July* 1825, the testator covenanted to pay a sum of 10,000*l.* sterling to trustees, upon certain trusts thereby declared for the benefit of Lady *Barbara* and her children; and by a codicil dated the 11th day of *July* 1825, referring to the deed of the 9th of *July*, he declared the 10,000*l.* to be in satisfaction of all legacies or sums of money given to his said daughter, or in trust for her, by his will, or any codicil thereto. In pursuance of his covenant, Lord *Coventry*, on the 1st of *August* 1825, laid out 10,000*l.* in the purchase of three per cent. Bank annuities, in the names of the trustees of the settlement made in the preceding *July*.

Lady *Barbara* and Lady *Sophia* were the two youngest children of the Earl of *Coventry*; and he had seven other elder children, each of whom, upon the death of *Thomas Coventry*, became entitled under the will of *Thomas* to legacies of 10,000*l.* four per cent. Bank annuities. Lady *Sophia* and Lady *Barbara* were not born at the time of *Thomas's* death, and took nothing under his will. In 1811, Lady *Augusta*, one of the seven elder children, intermarried with Sir *Willoughby Cotton*. Shortly afterwards the Earl of *Coventry* advanced 2200*l.* for the purchase of a commission for his son-in-law, and 360*l.* for the purchase of a lease of a house; and on that occasion he took from Lady *Augusta* an acknowledgment, signed by her, in the following words: "I acknowledge to have received from my father, the Earl of *Coventry*, the sum of 2,200*l.*, advanced to me at my request, towards the purchase of a commission in the army for my husband, *Willoughby Cotton*; also 360*l.* towards purchasing the lease of a house in *Cadogan Place*, which sums make together 2560*l.*, but which is not to be claimed from me

or

or my husband, otherwise than by a deduction from any property which may be left to or in trust for me or him by the will of my father."

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Under these several circumstances, the third question in the cause was, whether Lady *Sophia Gresley* was entitled, not only to the sum of 10,000*l.* four per cent. Bank annuities, according to the condition of the bond given by her father upon her marriage, but also to the 10,000*l.* four per cent. Bank annuities provided for her by the will.

Mr. *Bickersteth* and Mr. *James Russell* argued that, according to the general doctrine on the subject of double provisions or portions, the bond was a satisfaction of the legacy; and that the testator throughout the will manifested a plain intention to give equal benefits to his daughters. His reason for giving legacies of 10,000*l.* four per cent. Bank annuities to the two youngest daughters was, that each of the elder children had an equal legacy under the will of *Thomas Coventry*. The very motive of the bounty was equality. But if Lady *Sophia* was allowed to take the legacy in addition to the sum secured to her by the bond, the equality would be destroyed, and she would, to the extent of the legacy, derive more from her father than any of her sisters did. They cited *Hartopp v. Hartopp* (a), *Trimmer v. Bayne* (b), *Chave v. Farrant* (c), *Ex parte Pye* (d); and they referred to *Weall v. Rice* (e), *Booker v. Allen* (g), and *Lloyd v. Harvey* (h), as cases in which all the principal authorities had been reviewed, and the rule finally established.

It

(a) 17 *Ves.* 134.

(b) 7 *Ves.* 508.

(c) 18 *Ves.* 8.

(d) 18 *Ves.* 140.

(e) p. 251. *suprà*.

(g) p. 270. *suprà*.

(h) p. 310. *suprà*.

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It was true that the limitations of the settlement did not correspond exactly with the trusts on which the legacy was given. Sir *Roger Gresley* took an interest under the settlement, but took nothing under the will: Lady *Sophia* took a greater beneficial interest under the will than under the settlement; and the limitations to the children in the settlement and the will differed in various minute particulars, although the precise nature of the limitations in the settlement did not appear upon the pleadings. But such differences as these did not exclude the application of the rule against double portions; both provisions being substantially for the benefit of the daughter and her family.

Mr. Tinney, and Mr. Spence, contra.

Besides the differences between the trusts of the settlement and the trusts on which the legacy is given, it is to be observed, that the legacy is of greater amount than the provision made by the bond; for, according to the judgment of the Court on the first two questions, the legacy would entitle the legatee to 10,000*l.* four per cent. Bank annuities, while the bond will be satisfied by a like sum of 3½ per cent. stock. From the conduct of the testator to his other daughters, it may fairly be presumed, that he intended Lady *Sophia* to take both provisions. When Lady *Augusta* married, he advanced for her benefit a sum of 2,560*l.*, and he took the precaution of having an acknowledgment signed by her, for the purpose of shewing that the advancement was to be a satisfaction, *pro tanto*, of what she might be entitled to under his will. When he made a settlement of 10,000*l.* on Lady *Barbara* and her children, he was at the trouble of making a codicil, for the sole purpose of declaring, that the settlement was a satisfaction of any legacy he had given to her, though the only legacy

at

at time bequeathed to her was a life interest in 5000*l.* 4 per cent. stock. If the testator had meant the settlement on Lady *Sophia* to be a revocation of the legacy to her, would he not have taken the same course in the case of Lady *Barbara*, and declared his purpose by a codicil? The presumption thus arising, that the testator did not intend the settlement to be a satisfaction and ademption of the legacy, was greatly increased by the express declaration contained in his will that, with the exception of the sums expressly bequeathed to any of his children were to be, not in addition to, but in addition to, any portion or provision to which they were or should be entitled under any articles or settlement then already executed by

1833.

SHEFFIELD
v.
The Earl of
COVENTRY.

the MASTER of the ROLLS.

On the third question I am of opinion, that the settlement of 10,000*l.* 4 per cent. Bank annuities to Lady *Sophia* is satisfied by the bond given by the testator on her marriage, and that she is not entitled to both provisions. The inferences drawn from the testator's conduct with respect to Lady *Augusta* and Lady *Barbara*, do not afford the conclusions contended for as to the testator's intention; and the differences between the provisions of the settlement and the will are not such as to prevent the application of the rule as to double portions.

1831.

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Jan. 28.

GILL v. SHELLEY.

A testatrix gave a share of her residuary estate to the children of *Mary Gladman* deceased. *Mary Gladman* left two children, one legitimate, the other illegitimate. Evidence was admitted to prove that the illegitimate child had acquired the reputation of being the child of *Mary Gladman*; that the testatrix well knew that fact, and that *Mary Gladman* left only those two children.

THE testatrix, *Elizabeth Merricks*, the wife of *James Merricks*, being empowered by her marriage settlement to dispose of her estate notwithstanding her coverture, did, by her will, give the whole of her estate, both real and personal, to her husband for his life, and after his death she gave parts thereof to different persons; and as to her residuary estate she directed her trustees and executors "to divide, share, and pay the same equally to, between, and amongst *Anne Maria Hall*, widow, now or lately residing at *Carter's Corner* in the parish of *Hellinsley*, the adopted daughter of *Thomas Colbran*, heretofore of *Hailsham*, yeoman, deceased, the before named and described *Sarah Kennet* and *Thomas Martin* respectively, notwithstanding the bequests hereinbefore made to them, and over and above the same respectively; and also to and between and amongst all and every the legitimate children of my relations who (those who are relatives) were, are, or may be in consanguinity to me of the degree of first cousins, either paternally or maternally (except the before named *Elizabeth Stephens*, whom I exclude from receiving any part or share of the same); and in this last bequest I include *William Freeman*, the son of the late *Charles Freeman* of the *Cliffe* aforesaid, grocer, *Elizabeth Merricks* (deceased), the grandson of the before named *Henry Freeman* and *Mary* his wife, intending that he the said *William Freeman* shall have and take such part, share, and interest therein, as his father the said *Charles Freeman* deceased would have been entitled to if living under this my will in this particular respect; and in case any of the parties, or any of the children of my

y said relatives, to whom I have given a distributive
are of the residue and remainder of my said real and
ersonal estate, or of any other description of estates
t hereinbefore disposed of, and amongst whom I
clude the children of the late *William Martin* of
Hailsham aforesaid, shopkeeper and farmer, deceased;
so the children of the late *Elizabeth Hastings* of *Hail-*
sham aforesaid, deceased (before *Elizabeth Martin*); also
e children of the late *Mary Gladman*, of *East Dean* in
e said county of *Sussex*, deceased (before *Mary Black-*
man), and likewise the children of such of them my
id relatives last before described, as shall happen to die
my lifetime or in the lifetime of my said husband, the
are of him, her, or them so dying, shall go, and be pay-
ble, and paid equally to and amongst the children of
ch deceased person or persons)."

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GILL
v.
SHELLEY.

The testatrix died in the year 1827.

At the time of making her will, there were living two
children of *Mary Gladman*, who was then dead, and was
scribed in the will as the late *Mary Gladman*: one of
em, the Defendant *Charlotte Shelley*, was an ille-
itimate child, born before the marriage of her mother
ith *John Gladman*, and the other, a legitimate child,
wn after the mother's marriage.

Mary Gladman was the daughter of *Joseph* and *Mary*
Blackman, which *Mary Blackman* was a first cousin of
e testatrix.

The husband of the testatrix had died: and the
question in the cause was, whether the Defendant
Charlotte Shelley was entitled to share in the testatrix's
siduary estate as one of the children of the late *Mary*
Gladman.

It

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It was proved in the cause, that *Charlotte Shelley* was an illegitimate child of *Mary Gladman*, and born in the year 1796; that *Mary Gladman* was acquainted with the testatrix before the birth of the child; that, prior to her marriage, and soon after the birth of the Defendant *Charlotte Shelley*, she went to live in the house of the testatrix, and that the testatrix was well aware that *Mary Gladman* had such illegitimate child; that the child, when quite an infant, and during the residence of the mother with the testatrix, was frequently brought to the house of the testatrix, and treated affectionately by the testatrix; that, *Mary Gladman* being uneasy at her separation from her child, the testatrix proposed that the child should reside with some person near to her, and offered to pay the extra expense which would thereby be occasioned; that the Defendant *Charlotte Shelley* went by the name of *Blackman*, was put out to nurse for the first year after her birth, and afterwards resided with the father and mother of *Mary Gladman* until the marriage of *Mary Gladman*, and from that time she resided with *John Gladman* and *Mary Gladman* until the death of *Mary Gladman*; that *Mary Gladman*, after her marriage and until her death, resided with her husband at the distance of nine or ten miles from the testatrix, and continued to be in the habit of going to the house of the testatrix until she died; that she frequently took her two children with her to visit the testatrix, and that the testatrix well knew that *Mary Gladman* had only one child after her marriage.

Mr. *Bickersteth*, for the Plaintiffs.

Mr. *Pemberton* and Mr. *Wigram*, for *Charlotte Shelley*.

Mary Gladman had only one legitimate child. As she was dead at the date of the will, there were not persons,
and

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and there never could by any possibility be persons, who would answer the description of “children of *Mary Gladman*,” if that description was to be confined to legitimate children; and these facts were well known to the testatrix. It therefore becomes necessary to look to circumstances *dehors* the will (a), in order to see, whether there were persons who would come within the description, taken in a more extended sense, and whom the testatrix meant to denote by the words she used: *Woodhouselee v. Dalrymple* (b). Here the evidence establishes a state of circumstances, from which there arises a necessary implication that the testatrix included *Charlotte Shelley* as one of the children of *Mary Gladman*: “necessary implication, meaning,” as Lord *Eldon* says in *Wilkinson v. Adam* (c) “not natural necessity, but so strong a probability of intention, that an intention contrary to that which is imputed to the testator cannot be supposed.”

Mr. *Bacon*, for the representatives of *James Gladman*, the only legitimate child of *Mary Gladman*.

The only point, on which Lord *Eldon* in *Wilkinson v. Adam* received evidence *dehors* the will, was, to establish the fact that there were persons, not legitimate children, who had gained the reputation of children: “If my judgment upon this case,” says his Lordship (a), “is supposed to rest upon any evidence out of the will, except that which establishes the fact, that there were individuals who had gained by reputation the name and character of his children, that conclusion is drawn without

(a) See Mr. *Wigram's Examination of the Rules of Law respecting the Admission of Extrinsic Evidence in Aid of the Interpretation of Wills*, pp. 32, 33.

(b) 2 *Mer.* 419.

(c) 1 *Ves. & B.* 466.

(d) 1 *Ves. & B.* 462.

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without sufficient attention to the grounds on which the judgment is formed; my opinion being, that, taking the fact as established, that there were children who had gained the reputation of being his children, it does necessarily appear on the will itself, that he intended those children." Now assume that *Mary Gladman* had only one legitimate child, and that she had also an illegitimate child; that state of things will not entitle *Charlotte Shelley* to participate in the bequest along with the legitimate child of *Mary Gladman*. In *Hart v. Durand (a)*, a testator gave a legacy to "every of the sons and daughters of his late cousin:" his cousin left one legitimate daughter, and one son and one daughter illegitimate. It was held that the latter were not entitled under the will, and that evidence of the intention of the testator was not admissible. In *Swaine v. Kennerley (b)*, the bequest was to "all and every the child and children of the testator's late son *Thomas Swaine* deceased, equally to be divided between or amongst them." The son *Thomas* left three children, of whom one was legitimate, but the other two, *Thomas* and *John Swaine*, were born before marriage. Lord *Eldon* held that the legitimate son alone was entitled, and assigned as the reason of his judgment, "that the will itself does not prove that the testator meant an illegitimate child;" "The will," he said, "must prove, that illegitimate children are intended; and extrinsic evidence can be received only for the purpose of collecting who had acquired the reputation of being children of the person named in the will." There is here a legitimate child; and the circumstance that there is only one legitimate child will not enable an illegitimate child to take along with him under the general description of children.

Mr.

(a) 3 *Anst.* 684.(b) 1 *Ves. & B.* 469.

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Mr. *Pemberton*, in reply, said, that the rule that children and illegitimate children could not take together under the general description of children, applied only to cases in which the word was used to describe a class, and not where (as in the case before the Court) the word clearly described particular individuals: that if, in *Wilkinson v. Adam*, the testator had survived his wife and married *Ann Lewis*, the legitimate children of that marriage would have taken jointly with the illegitimate children, in whose favour the cause was decided: that *Swaine v. Kennerley* was distinguishable from the case before the Court, because it did not appear that, in that case, the facts were known to the testator; that the same remark applied to *Hart v. Durand*, for, as the testator there spoke of sons, when there was no legitimate son and only one illegitimate son, the will shewed that he was not acquainted with the state of *J. Durand's* family; and besides, the evidence in that case was tendered to prove the testator's intention to comprehend illegitimate children, and not to establish facts, from which, taken in connection with the language of the will, that intention would necessarily be inferred.

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The question in cases of this sort is a question of intention. *Primâ facie*, the term children is intended to mean legitimate children; and if there are legitimate children, or if it be possible that there should be legitimate children of the person named, no illegitimate child can take under the description of children. If, in this case, there had been no legitimate child of *Mary Gladman* at the time of making the will, and there had been two illegitimate children, inasmuch as the death of *Mary Gladman* made it impossible that there should be any future legitimate child, there can be no doubt that

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...ence would have been admissible to prove the
and the two children, who had acquired the re-
putation of being the children of *Mary Gladman*, would
be taken under the description of her children by virtue
of the clear intention of the testatrix. If, in this case,
the gift had been "to the two children" of *Mary Gladman*
deceased, then, inasmuch as the death of *Mary Gladman*
had made it impossible that there should be two legiti-
mate children, ought not evidence to be admissible of
the facts from which it was demonstrated that the tes-
tatrix meant to include the illegitimate child who had
acquired the reputation of being the child of *Mary*
Gladman? And is there, as to this point, any sound
and rational distinction between the expression "the
children," which necessarily describes more than one
child, and the expression "the two children?"

Considering, then, that "children" is an ambiguous
term, which may mean legitimate child or illegitimate
children who have acquired the reputation of being
children; and assuming that, if there are, or by any possi-
bility may be, legitimate children to satisfy the expression,
no illegitimate child can take together with the legitimate
children, although that point is denied by the judges in
Wilkinson v. Adam, — I think the evidence admissible in
this case: and the evidence, being admitted, demonstrates
that the testatrix did mean to include the Defendant
Charlotte Shelley under the expression of "the children
the late *Mary Gladman*."

In the case of *Swaine v. Kennerley*, the expression is,
"the child or children of my late son *Thomas Swaine*,
deceased," which implied a doubt in the mind of the
testator whether his late son had more than one child.
In *Hart v. Durand*, the expression is, "to every of the
sons and daughters of my late cousin *J. Durand*;" and,
that

that cousin having left only one legitimate daughter, and only two illegitimate children, a son and a daughter, the expression in the will manifested that the testator was ignorant of the actual state of *Durand's* family. Neither of these cases, therefore, demonstrated a clear intention on the part of the testator in favour of the legitimate children. (a)

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(a) See *Bagley v. Mollard*, 1 Russ. & Mylne, 581.

DOWLING v. TYRELL.

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Feb. 14.

IN this case, the testator gave a legacy to an infant described in the will as his natural child, with a direction to apply the interest for his maintenance, during his minority.

Where a legacy is given to a natural child, with direction to apply the interest for his maintenance, the interest is payable from the death of the testator.

A question was made, whether the interest was payable on the legacy from the death of the testator, or from the end of the year after his death.

The cases cited were *Raven v. Waite* (a), *Beckford v. Tobin* (b), *Newman v. Bateson*. (c)

The MASTER of the ROLLS ruled that interest was payable from the death of the testator.

(a) 1 Swans. 553. (b) 1 Ves. sen. 308. (c) 3 Swans. 689.

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Feb. 14.

COLLINSON v. PATER.


COLLINSON v. KNIBB.

A judgment-debt due to a testator, which in his lifetime had been reported in a creditor's suit, to be an incumbrance affecting the real estate of the debtor, will not pass by his will to a charitable use, being within the statute of the 9 G. 2. c. 36.

GEORGE KNIBB, by his will, dated the 26th of *July* 1826, bequeathed unto the Plaintiffs, their executors, administrators, and assigns, all his personal estate and effects, upon trust to get in the same, and all such debts as might be owing to him at the time of his decease, and to sell and convert into money all such part or parts of his personal estate as should not at the time of his decease, consist of ready money. He then directed that the trust-monies should be invested on government securities; and that, after paying out of the dividends an annuity of 25*l.* to *Elizabeth Knight* during her life, his trustees and executors should divide the residue of the interest and dividends equally between four such persons, being the widows of respectable tradesmen, who were at the time of their decease inhabiting and dwelling in the parish of *Newport Pagnel*, such widows being members of the established Church of *England*, as the vicar, for the time being, of the parish should, from time to time, nominate and appoint. Upon the death of *Elizabeth Knight*, the annuity bequeathed to her was to fall into the residue, and be distributed in the same way.

By a codicil, dated the 12th of *August* 1826, the testator directed his trustees, after payment of the annuity, to divide the residue of the dividends of the trust funds, equally between *Ann Pater*, *Ann Higgins*, *Susannah Inns*, and *Hannah Wilson*, during the term of their natural lives respectively; and when and as often as any one of the last-mentioned persons should die, to pay the share

share of her so dying to such other person, being the widow of a respectable tradesman, who was at the time of his decease inhabiting and dwelling in the town of *Newport Pagnel*, such widow being a member of the established Church of *England*, as the vicar, for the time being, of the said parish should, from time to time, nominate and appoint, during the term of her natural life: and when and as often as any one or more of the said four widows, so to be nominated and appointed as aforesaid, should die, to pay the share or shares of her or them so dying to such other person or persons answering the description aforesaid, as the said vicar for the time being should nominate and appoint, during the term of her or their life or lives respectively.

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 PATER.

The testator in his lifetime entered up a judgment against a person of the name of *Mansell* for the principal and interest due on a bond conditioned for the payment of 2000*l.* *Mansell* having died, and a suit having been instituted for the administration of his estate, *Knibb* proved his debt in that suit; and the master, in his report made in *Knibb*'s lifetime, found the judgment to be a charge on *Mansell*'s real estates. *Mansell*'s personal estate was insufficient for the payment of his debts; and the judgment debt was paid to *Knibb*'s executors out of the proceeds of the sale of *Mansell*'s real estates.

The question was whether, in so far as the residue was composed of *Mansell*'s debt, the ultimate gift to charitable purposes was not void, as coming within the Mortmain Act, 9 G. 2. c. 36.

Mr. *Wray*, for the Attorney-General.

Mr. *Tinney* and Mr. *Ching*, for one set of Defendants.

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Mr. *Bickersteth* and Mr. *Teed*, for other Defendants.

In support of the validity of the gift it was argued, that the debt due from *Mansell* could not be considered as an "estate or interest in or a charge or incumbrance affecting any lands:" that the words of the statute had reference only to charges and incumbrances, on certain specified lands; and that the judgment gave no estate in the land, but merely a right to sue out an *elegit*.

On the other hand, it was contended that a judgment debt was, according to the common import of language, a charge affecting land: it gave the judgment creditor a lien on the lands; and secured to him a priority over any estate created by a subsequent conveyance from the debtor. In the present case, the Master had actually found this debt to be a charge on *Mansell's* real estate; and to such an extent was it an interest in land at the time of *Knibb's* death, that it was subsequently, by means of the agency of the Court of Chancery, paid out of the proceeds of *Mansell's* real estate.

The MASTER of the ROLLS.

The testator, *George Knibb*, in his lifetime had a judgment entered up against one *Mansell*, for the sum of 2315*l.* 2*s.* 11*d.* due to him on *Mansell's* bond. After the death of the debtor, a creditor's suit was instituted for the administration of his estate; and it being in that suit referred to the Master to take an account of the mortgages and other incumbrances affecting the real estate of the debtor, that judgment debt was proved under the decree, and the Master, in his report made in the lifetime of the testator, stated the judgment debt as one of the incumbrances affecting the real estate of *Mansell*. The testator, by his will, gave his residuary estate to certain charitable uses; and the question in the
cause

cause is, whether this judgment debt is within the statute of the 9 G. 2. c. 36.

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I am of opinion that it is within the statute, and will not pass to charitable uses.

BETWEEN

CATHERINE RICHARDS, wife of DAVID
RICHARDS, by her next friend, and JOHN
JOHN - - - - Plaintiffs,

ROLLS.
Feb. 15.

AND

THOMAS DAVIES, JOHN DAVIES, and DAVID
RICHARDS - - - Defendants.

BY articles of agreement, dated the 19th of *January* 1799, a partnership was constituted for a long term of years, which had not yet expired. Under these articles the Plaintiffs were interested in the partnership; but they had not interfered actively in the business, which was managed by the Defendant *Thomas Davies*. The Plaintiffs alleged that proper accounts of the partnership dealings had not been rendered to them from time to time, and that they were excluded from the means of ascertaining the state of the partnership affairs. They, therefore, filed their bill in the Court of Great Sessions for the counties of *Carmarthen, Pembroke, and Cardigan*, praying that an account of the partnership dealings might be taken, and that the partnership might be conducted and carried on during the residue of the term, for which the same was established, in conformity to the articles

The Court will direct an account of past partnership transactions, though the bill does not pray a dissolution; but it will make no order for carrying on partnership concerns, unless with a view to a dissolution.

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v.

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of agreement of the 19th of *January* 1799; that *Thomas Davies* might be decreed, from time to time, to produce to the Plaintiffs, and to permit them to have access to, all the books of the partnership; and that if necessary, a proper person might be appointed to manage and conduct the partnership trade, and to receive the debts due and to become due to the same.

The answer suggested that the accounts of all dealings prior to the filing of the bill had been settled; but there was no evidence of the alleged settlements.

The cause came on to be heard in the Court of Great Sessions, shortly before the act abolishing the *Welsh* judicature came into operation; and the suit was dismissed with costs, on the ground that a partner could not file a bill to have the accounts of a partnership taken, unless he prayed the dissolution of the partnership.

The cause was removed by the Plaintiffs into the Court of Chancery, pursuant to the provisions of 11 G. 4. & 1 W. 4. c. 70.; and a petition of re-hearing was presented, which now came on to be argued.

Mr. *Bickersteth* and Mr. *John Wilson*, for the Plaintiffs.

It may be true that the Court will not interfere to manage a partnership by a receiver, except in the case of a dissolution, and with a view to winding up the concern; but to say that one partner shall not have an account against another, unless he will consent that the partnership shall be at an end, is a very different proposition, and one not warranted by authority. While
the

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2.

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the old action of account was in use, one partner might have had the benefit of it against another, without putting an end to the partnership. "If two joynt merchants," says Lord Coke (a), "occupy their stocke, goods, and merchandizes in common to their common profit, one of them naming himselfe a merchant shall have an account against the other naming him a merchant, and shall charge him as *receptor denariorum ipsius B. ex quâcunque causâ et contractu ad communem utilitatem ipsorum A. et B. provenien'*, sicut per legem mercatoriam rationabiliter monstrare poterit." The action of account has now fallen into desuetude, and a partner is without remedy at law: but the bill in equity has been substituted for the action of account; and it would be extraordinary if a bill for an account could not be maintained where in former times an action of account might have been brought. In *Harrison v. Armitage* (b), it was expressly held that one partner might file a bill against his co-partner for an account, though he did not pray a dissolution; and it was there said that *Forman v. Homfray* (c) applied only to a case of interim management, which would not be granted, unless the bill prayed a dissolution of the partnership.* If the rule were otherwise, the greatest injustice might be

(a) Co. Litt. 172. a. (b) 4 Mad. 143. (c) 2 Ves. & B. 329.

* In *Knowles v. Haughton*, 11 Ves. 163., the bill prayed an account without praying a dissolution; and the decree directed the accounts to be taken. In *Chapple v. Cadell*, Jac. 537., the bill did not pray a dissolution; yet a decree was pronounced by Sir William Grant,

declaring the rights of the partners, and directing accounts of the partnership dealings to be taken; and that decree was affirmed by Lord Eldon. See, however, *Marshall v. Colman*, 2 J. & W. 266. *Loscombe v. Russell*, 4 Sim. 8.

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be done without the possibility of remedy. A trader admits his clerk into a valuable business, with a view of securing a large proportion of the profits to his own widow and children after his decease; the person thus admitted gets into the management; the original owner dies; the business is carried on for a short time; the survivor, knowing the widow and children could not carry it on themselves, refuses to account: if he is not made to account, he is a great gainer; if those, whom he has wronged, are induced to pray for a dissolution, he is a still greater gainer, being enabled by that means to appropriate to himself the whole benefit of the business. What can be more extravagant has to say, that, under such circumstances, the party injured shall not have an account, unless he releases the party, who has wronged him, from the obligations of a partner in time to come?

Mr. Pemberton, contra.

Forman v. Homfray was not a case of interim management: it was a motion to have money paid into Court; and Lord *Eldon* refused to make the order, on the ground that a partner could have no remedy against his co-partner on a bill not praying relief. He there says that "he did not recollect an instance of a bill, filed by one partner against the other, praying an account merely, and not a dissolution;" and he observed that, "if a partner can come here for an account merely, pending the partnership, there seems to be nothing to prevent his coming annually." *Waters v. Taylor* (a) is to the same effect; and in the case of *Kinder v. Taylor* (mentioned in *Gow's Treatise on Partnership*) (b) the same doctrine is recognised. Here the bill, far from contemplating a dissolution, prays that the partnership may be

(a) 15 Ves. 10.

(b) Stated also in *Collyer on Partnership*, Appendix No. 11.

ried on during the residue of the term, and the
t is called upon to interfere in carrying it on; so
secure to the Plaintiffs what they conceive they
a right to.

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le MASTER of the ROLLS.

bill was filed in the Court of Great Sessions of the
of counties of *Carmarthen, Pembroke, and Cardigan*
e partner against another, praying for an account
hat was due to the Plaintiffs in respect of the past
ership transactions, and that the partnership might
arried on and conducted under the decree of the
t.

the hearing of the cause in *Wales*, the bill was dis-
t with costs.

ne Plaintiffs, under the statute of 11 G. 4. & 1 W. 4.
, presented a petition of rehearing.

support of the judgment in the Court below it is
ended, that a court of equity cannot entertain a suit
partnership account, unless the bill seeks a dis-
ion of the partnership.

he Plaintiff, for monies due to him on a partnership
unt, has no relief at law, and if a court of equity
es him relief, he is wholly without remedy. This
d be contrary to the plain principles of justice, and
ot be the doctrine of equity.

is objected, that if such a suit be entertained, the
ndant may be vexed by a new bill, whenever new
ts accrue; but what right has the Defendant to
plain of such new bill, if he repeats the injustice of
holding what is due to the Plaintiff? Would not
the

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the same objection lie in a suit for tithes, which accrue *de anno in annum*?

I must, therefore, decree the account of the past partnership transactions; but I can make no order for carrying on the partnership concerns, unless with a view to a dissolution.

The decree reversed the order of dismissal, and directed the Defendants to pay the Plaintiffs the costs which had been paid on the dismissal of the suit; and it referred it to one of the Masters to take an account of the dealings and transactions of the partnership in the pleadings mentioned, from its commencement up to the date of the report; in taking which account the Master was not to disturb any stated or settled accounts, which he should find had been come to by the partners. Reg. Lib. 1830. B. fol. 1831—2.

1831.

MACARTNEY *v.* GRAHAM.

ROLLS.
Feb. 18.

THE suit was instituted to recover payment of a bill of exchange which had been lost, and the Plaintiffs had offered an indemnity to the Defendant, before the institution of the suit. The loss of the bill was proved; and on the hearing, the Vice-Chancellor referred it to the Master to inquire whether the indemnity, which had been tendered, was a proper indemnity, but gave no costs up to the hearing.

The Master found, that the indemnity, which had been tendered, was a proper indemnity; and the question now was, as to the costs subsequent to the original decree.

Mr. Pemberton and *Mr. Koe*, for the Plaintiffs.

Mr. Cooper, for the Defendant.

The MASTER of the ROLLS.

The Defendant thought fit to dispute the fact, whether the indemnity, which had been offered to him, was a proper indemnity; and the Master has found that it was a proper indemnity. It is plain, therefore, that as the costs subsequent to the original hearing have been occasioned by the Defendant refusing, without sufficient reason, to be satisfied with the indemnity which was offered to him, he ought to be charged with such costs.

In a suit to recover the amount of a lost bill of exchange, the loss of the bill being proved at the hearing, the Defendant, if he disputes the sufficiency of an indemnity which has been offered to him, and the Master finds in favour of the indemnity, will be ordered to pay the costs subsequent to the original hearing.

1831.

Rolls.
Feb. 18.

PEAKE v. GIBBON.

In a foreclosure suit, to which the provisional assignee of the Insolvent Debtors' Court is made a party, as representing the owner of the equity of redemption, the costs of the provisional assignee will be ordered to be paid by the Plaintiff, who will add them, along with his own costs, to the sum due on the mortgage.

THE bill was filed by a mortgagee to foreclose the heir-at-law of the mortgagor. The heir took the benefit of the Insolvent Act, and the provisional assignee was made a Defendant by supplemental bill.

At the hearing, Mr. *Teed* appeared for the provisional assignee, and asked that his costs might be provided for. The proper course, he said, would be for the Plaintiff to pay them, and to add them, along with his own costs of suit, to his security.

Mr. *Pemberton* and Mr. *Wakefield*, for the Plaintiff, contended, that the provisional assignee could not be in a better situation than the insolvent whom he represented, and must take his chance of getting his costs out of the assets of the insolvent. It would be a great hardship on mortgagees, holding probably a security already insufficient, if they were to be burthened with the costs of the provisional assignee, when the mortgagor became insolvent; and it would be a great encouragement to the provisional assignee to appear, when in fact he ought not to appear, there being no purpose to be served by his appearance, except simply that he might ask for his costs.

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The provisional assignee is a necessary party to the suit, as representing the interest of the mortgagor; and being a public officer, who does not take upon himself by any act of his own to represent the insolvent, but on whom the duty of representing the estate is thrown for

public convenience, it would be a great hardship, if rule, which applies to assignees in bankruptcy, were added to him. He must have his costs from the plaintiff, who will add them to the costs which he is led to be paid, before he can be redeemed.

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MAJOR v. LANSLEY.

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Jan. 24. 27.
31.
Feb. 25.

WILLIAM NEALE, by his will, dated the 28th of *March* 1821, devised certain real estates to his son, *James Neale*, for life; and, after his decease, to his daughter, *Louisa Reding*, her heirs and assigns, for ever; and, nevertheless, after the decease of *James Neale*, he devised an annuity, or clear yearly rent of 50*l.*, payable yearly, which he thereby gave to his niece, *Martha Lansley*, wife of *Edward Lansley*, during her natural life, for her sole use and benefit, notwithstanding her marriage, and free from the debts, control, or engagements of her said husband, for which her receipt alone to be a good discharge; and from and after the death of *Martha Lansley*, he, the testator, directed that if *Edward Lansley* should be then living, the said annuity should be paid to *Edward Lansley*, and his assigns, during his natural life, by the like half yearly payments. Powers of entry and distress, in case the annuity should be in arrear, were given to *Martha Lansley* and *Edward Lansley* successively.

A married woman, to whom a rent-charge for life in reversion is devised to her separate use, without the intervention of trustees, joins with her husband in assigning it for a valuable consideration: she is bound by that assignment after the death of her husband.

The testator died in *November* 1822: *James Neale*, brother, on whose decease the annuity became payable, died in *January* 1828: and *Edward Lansley* died in the following *August*, leaving his wife, *Martha*, surviving.

By

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By an indenture, dated in *October* 1823, and made between *Edward Lansley* and *Martha* his wife, of the first part, the Plaintiff of the second part, *Wheeler* and *Gilbert* of the third part, and *Rawlins* of the fourth part, in consideration of 400*l.*, paid by the Plaintiff to *Lansley*, and which sum, with interest, *Lansley* covenanted to pay on or before the 4th of *April* then next, it was witnessed that *Lansley* and *Martha* his wife did grant, bargain, sell, and confirm unto *Wheeler* and *Gilbert*, their heirs and assigns, the said annuity or yearly rent of 50*l.*, given by the will of *William Neale* to *Martha Lansley*, together with all her powers and remedies for recovering and compelling payment thereof, to hold the same to *Wheeler* and *Gilbert*, their heirs and assigns, during the life of *Martha Lansley*, subject to the provisos, declarations, and agreements thereafter expressed: and *Edward Lansley*, with the privity and approbation of *Martha* his wife, covenanted with the Plaintiff that he, *Lansley*, and his wife would, as of *Trinity* term then last or *Michaelmas* term then next, levy to *Wheeler* and *Gilbert* a fine *sur concesserunt* of the said annuity or yearly rent, which fine was to enure to the use of *Wheeler* and *Gilbert* and their heirs during the life of *Martha Lansley*, subject to the provisos, agreements, and declarations thereafter expressed.

By the same indenture, *Edward Lansley* conveyed to *Wheeler* and *Gilbert*, and their heirs, the annuity given to him in reversion, expectant upon the death of his wife. It was further declared and agreed that if *Edward Lansley*, his heirs, executors, administrators, or assigns, should pay to the Plaintiff, his executors, administrators, or assigns, the sum of 400*l.* with interest as therein-before mentioned, *Wheeler* and *Gilbert* should reconvey the said annuity, thereby first granted and confirmed, unto the said *Martha Lansley* for her sole and separate use,
and

and in the same manner, and with the same powers as were expressed concerning the same, in the will of *William Neale* ; and reconvey the said annuity or yearly rent and premises, thereby secondly granted, unto *Edward Lansley*, or his assigns, as he or they should direct.

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A power was given to *Wheeler* and *Gilbert*, if the principal money and interest was not discharged within six months after payment had been required in writing, to sell the annuities : the monies arising from the sale were to be applied in satisfying what should be due for the 400*l.* and interest ; and the surplus was to be paid to *Edward Lansley*, and *Martha Lansley*, their respective executors, administrators, or assigns, according to their respective rights and interests.

At the death of *Edward Lansley* the whole of the principal sum was due, together with an arrear of interest ; and the bill was filed to have the equity of redemption foreclosed or the annuities sold.

No fine had been levied.

Mr. *Treslove*, and Mr. *Girdlestone*, senior, for the Plaintiff.

Mr. *Girdlestone*, junior, for the Defendant *Martha Lansley*.

The annuity being given without the intervention of trustees, the husband took the legal estate in it during the joint lives of himself and his wife.* At the time when
the

* In *Polyblank v. Hawkins*, (1 Doug. 329.), it was held, that the husband of a woman tenant in fee, must declare on a *scisin in fee in himself and his wife in right of his wife*, and that if he stated

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the security was executed, she had only a reversionary equitable interest. Upon the death of the husband, the legal estate vested in her. The equitable interest, which had previously existed in the contemplation of this Court, in order that effect might be given to the direction that the annuity was to be to her separate use, ceased. Upon the legal estate the deed of 1823 had no operation; and there was not now any distinct equitable estate to her separate use, which the deed could charge. A fine would have bound her legal interest; and the husband's covenant to levy a fine shewed that the parties were dealing upon the supposition, that without a fine the interest of the wife could not be effectually charged. A fine, however, had not been levied; and as the deed was at law a mere nullity as against the wife, she was now entitled to a legal annuity, which was not subject to any incumbrance or charge. The Plaintiff, therefore, was not entitled to any relief against Mrs. *Lansley*, and the bill ought to be dismissed.

In reply, Mr. *Treslove* insisted that the annuity being given to the separate use of the wife, she was, *quod* the annuity, a *feme sole*: that she was bound by the deed which she had executed; and that that deed bound the annuity at all times, however her interest in it might be afterwards modified or varied.

Rippon v. Dawding (a), *Bramhall v. Hall* (b), *Wright v. Sir Henry Englefield* (c), *Wright v. Lord Cadogan* (d), *Hyde v. Price* (e), *Compton v. Collinson* (g), *Sturgis v. Corp* (h), *Martin v. Mitchell* (i), were cited.

The

(a) *Amb.* 565.

(b) *Amb.* 467.

(c) *Amb.* 468.

(d) 1 *Bro. P. C.* 486. *Toml.* ed.

(e) 3 *Ves.* 437.

(g) 1 *H. Bl.* 534.

(h) 13 *Ves.* 190.

(i) 2 *J. & W.* 413.

stated that *he was seised in his his wife*, it would be bad on special demurrer. *demesne as of freehold in right of*

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The Defendant, being a feme covert entitled for life to her separate use to a reversionary interest in an annuity charged on real estate, joined with her husband in assigning the annuity by deed to the Plaintiff. The husband having died a few months after this reversionary interest fell into possession, the Plaintiff's title to the annuity was disputed by the wife, upon the ground that by the death of the husband the legal interest in the annuity became vested in her, and had not passed to the Plaintiff, no fine having been levied by her.

The wife, at the time of the assignment, had an equitable interest in the annuity or rent charge for her life to her separate use, and the legal interest was then in the husband for the joint lives of himself and his wife; and, in the consideration of a court of equity, the subsequent accession of the legal interest to the wife by the death of the husband cannot defeat the effect of the equitable assignment of her beneficial interest, which she had before made for a full and valuable consideration.

1831.



BETWEEN

Nov. 25.
Dec. 24.

ELIZABETH DONNE - - - Plaintiff,

AND

REUBEN HART - - - Defendant.

The contingent reversionary interest of the wife in the trust of a term for years may be sold by the husband; and the wife surviving will be bound by such sale, though the husband dies before the contingency is determined or the reversion falls into possession.

WILLIAM HANNAM deceased, by his will dated the 17th of *October* 1792, bequeathed to trustees, among other things, a leasehold for years, upon trust for his son *Thomas Hannam* for his life, and after his decease, upon trust for all and every the children of *Thomas* whom he should leave at the time of his decease, their executors, administrators, and assigns, in equal shares and proportions. The testator also bequeathed unto the same trustees another leasehold for years, upon trust for his wife during her life, and after her decease, for his son the said *Thomas Hannam* during his life, and after his decease, for all and every the children of his son *Thomas*, which he should have at the time of his decease, their executors, administrators, and assigns, in equal shares and proportions.

The testator died in the year 1794; and his widow shortly afterwards. The son *Thomas* had several children, one of whom, *Elizabeth*, intermarried, in the year 1810, with *Theophilus Henry Donne*.

By an indenture of assignment, bearing date the 20th of *August* 1812, and made between *Theophilus Henry Donne* and *Elizabeth* his wife of the one part, and *Reuben Hart* of the other part, — reciting that *Donne* and his wife

and contracted with *Hart* for the sale to him of all right and interest in and to the messuages, tenements, stocks, funds, and securities for money bequeathed by the will of *William Hannam*, for the price of 150*l.*, — it was witnessed that, in consideration paid by *Hart* to *Donne* and his wife, and of the sum of 95*l.* covenanted to be paid within a year after the death of *Thomas Hannam* by *Hart* to *Donne* and his wife, *Donne* and his wife and each of them sold and assigned unto *Hart*, his executors, administrators, and assigns, all their estate, right, and interest, and proportions in all the leasehold premises bequeathed by the will of the testator, to hold the same unto *Hart*, his executors, administrators, and assigns, for the residue of the terms respectively to come therein; and nevertheless to the life estate of *Thomas Hannam*.

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Philippus Henry Donne died in the year 1823; *William Hannam* died in the year 1830, leaving five children, of whom only one was surviving.

At Hilary term 1831, *Elizabeth*, the widow of *Donne*, brought a bill against *Hart*, insisting that the assignment of the leasehold premises was not operative as against her.

Pemberton and Mr. *Bligh*, for the Plaintiff, cited *Lee v. Lee* (a), *Purdew v. Jackson* (b), *Honner v. Honner* (c), and *Watson v. Dennis* (d); and they argued that the same principle, which applied to reversionary interests in personal chattels, extended to a contingent reversionary interest in the trust of a term.

Mr.

2 *Madd.* 16.

(c) 3 *Russ.* 65.

1 *Russ.* 1.

(d) 3 *Russ.* 90.

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Mr. *Phillimore*, *contra*.

Lord *Coke* says (a), "A man may have a terme for yeares in the right of his wife, whereof the husband hath power to dispose at any time during his life, and if he surviveth his wife, the law doth give the lease to him. But if he make no disposition thereof, and his wife survive him, it remaineth with the wife. If a man be possessed of a terme of forty yeares in the right of his wife, and maketh a lease for twenty yeares, reserving a rent, and die, the wife shall have the residue of the terme, but the executors of the husband shall have the rent, for it was not incident to the reversion, for that the wife was not party to the lease. So note, a disposition of part of the terme is no disposition of the whole. But if the husband grant the whole terme, upon condition that the grantee shall pay a summe of money to his executors &c., the husband die, the condition is broken, the executors enter, this is a disposition of the terme, and the wife is barred thereof; for the whole interest was passed away." In another passage (b), Lord *Coke* expresses himself thus: "If she (the wife) were possessed of a terme for yeares, yet he (the husband) is possessed in her right; but he hath power to dispose thereof by grant or demise; and if he be outlawed or attainted, they are gifts in law. Upon an execution against the husband for his debt, the sheriffe may sell the terme during her life; but the husband can make no disposition thereof by his last will. Also, if he make no disposition or forfeiture of it in his life, yet it is a gift in law unto him if he doe survive his wife; but if he make no disposition, and die before his wife, she shall have it againe." Mr. *Butler*, in his note (c), lays down the doctrine in very explicit terms:

(a) *Co. Litt.* 46. b.(b) *Co. Litt.* 351. a.(c) *Co. Litt.* 351. a. note 304.,
edition of 1794.

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terms: "If a person marries a woman entitled to a possible or contingent interest in a term of years, if it is a legal interest, that is, such an interest as, upon the determination of the previous estate, or the happening of the contingency, will immediately vest in possession in the wife, there the husband may assign it, unless perhaps in those cases where the possibility or contingency is of such a nature that it cannot happen during the husband's lifetime." *Grey v. Kentish* (a), *Bates v. Dandy* (b), *Theobalds v. Duffoy* (c), *Sir Edward Turner's Case* (d), and *Tudor v. Samyne* (e), are authorities which confirm the same proposition. The assignment of the husband passes the whole of the wife's interest in a term, whether her interest be immediate and vested, or contingent and reversionary.

Mr. *Pemberton*, in reply, observed that the authorities, which had been cited, had reference merely to legal interests in terms. "There are," says Sir *William Grant*, in *Mitford v. Mitford* (g), "some legal interests which do not admit or stand in need of being reduced into possession, being in possession already, and not lying in action; as terms for years, and other chattels real, of which the legal title is in the wife. They will survive, if no act is done by him; but he may assign them, which passes the legal interest, whether with or without consideration." The doctrine, therefore, had no application to cases, in which the conveyance of the husband does not pass any legal interest.

The

(a) 1 *Atk.* 280.

(b) 2 *Atk.* 207.

(c) 9 *Mod.* 102.

(d) 1 *Vern.* 7.

(e) 2 *Vern.* 270.

(g) 9 *Ves.* 87.

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Dec. 24.

The MASTER of the ROLLS.

In this case *William Hannam* by his will gave a term of years, to which he was entitled in certain houses, to trustees, upon trust for his son *Thomas*, during his life, and after the death of *Thomas*, for such child or children as he should leave at his decease. *Thomas* had, among other children, a daughter, who is the Plaintiff, and who, during the life of her father, intermarried with *Theophilus Henry Donne*. *Donne*, and the Plaintiff his wife, in the lifetime of her father, assigned her contingent interest in this term of years to the Defendant, for a valuable consideration. *Donne* died, leaving the father him surviving; and, the father being now dead, the Plaintiff claims this term, upon the ground that the assignment to the Defendant was void.

It is clear that the wife's contingent legal interest in a term may be sold by the husband; and there is no difference in equity between the legal interests in and the trusts of a term.

1881.

BETWEEN

WILLIAM SIMSON and RICHARD PAR-
ROTT, - - - - - Plaintiffs,

ROLLS.
Feb. 15.
March 23.

AND

JENKIN JONES and JOHN WILLIAM INNES,
Defendants.

THOMAS KELLY, being possessed of certain leaseholds held for long terms of years, by his will, dated the 18th *August* 1818, after other devises and bequests, gave and devised unto his daughter *Mary Hern*, and the Plaintiffs, *William Simson* and *Richard Parrott*, their heirs, executors, and administrators, all his freehold and copyhold estates not specifically bequeathed, and all other his estate and effects, upon trust, to pay unto his sister, *Margaret Doran*, for her life, an annuity of 30*l.*, and unto his said daughter, *Mary Hern*, an annuity of 200*l.* for her life, for her separate use, which several annuities he charged upon his leasehold messuages not specifically bequeathed; and as to all the residue of his said trust estate and effects, and not thereinbefore specifically bequeathed, charged with the said several annuities, upon trust for his the testator's grandchildren, *Thomas Hern* and *Margaret Hern*, their heirs, executors, administrators, and assigns, to be equally divided between them, share and share alike, as tenants in common, to be paid, assigned, and transferred unto his grandson, when he should attain the age of twenty-one years, and the share of his granddaughter to be paid, assigned, or transferred to her when she should attain the age of twenty-one years, or marriage, which should first happen; and the testator thereby willed and declared, that

On the marriage of a female infant who was a ward of Court, and entitled to a leasehold estate to her separate use, a settlement was made under the order of the Court, giving to the trustees a power of sale over the leasehold estate:—
A sale made by the trustees under the power, during the minority of the female infant, is not valid.

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the share of his granddaughter *Margaret* should be for her own sole and separate use and disposal, exclusive of any husband or husbands with whom she should intermarry, and wherewith he, they, or any of them should not intermeddle; neither should the same, or any part thereof, be subject or liable to his or their or any of their debts, control, management, or engagements, but the receipt or receipts of his said granddaughter alone, or of such person or persons as she should from time to time order, direct, or appoint to receive the same, should only be effectual and sufficient discharges for the same. In case either of his grandchildren died before his or her share became a vested interest, the share of him or her so dying was to go to the survivor: the share of his grandson was to become a vested interest on his attaining his age of twenty-one years, and that of his granddaughter on her attaining the age of twenty-one years, or marriage; and in case both his grandchildren should depart this life without attaining vested interests, the testator gave the trust property over as therein mentioned. He appointed his daughter *Mary* and the Plaintiffs, executrix and executors of that his will.

Thomas Kelly died on the 13th August 1823, and the Plaintiffs alone proved his will. The daughter *Mary* did not prove the will, or act in the execution of the trusts of it; but she was appointed guardian of her children by an order of the Court of Chancery made upon petition.

Some time afterwards *Thomas Hern* and *Margaret Hern*, by their mother, as their next friend, instituted a suit in the Court of Chancery against the two trustees and executors, and *Margaret Doran*, for the administration of the estate of the testator, and the execution

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execution of the trusts of his will; and *George Eshelby* having made proposals of marriage to the granddaughter, who was then of the age of eighteen years, it was, by an order, dated the 22d of *January* 1829, referred to the Master to consider and certify whether *George Eshelby* was a proper person for the Plaintiff, *Margaret Hern*, to intermarry with: and if the said Master should be of opinion that he was a proper person, he was to lay proposals before the Master, and the Master was to inquire and certify whether the same were fit and proper to be carried into execution.

The Master, by his report, dated the 11th of *February* 1829, certified that *George Eshelby* was a proper person for the Plaintiff, *Margaret Hern*, to intermarry with, and approved of a proposal which had been laid before him for the settlement of her property.

By another order, dated the 12th of *February* 1829, the Master's report was confirmed; and it was referred to him to approve of a proper settlement, or articles for a settlement, upon the basis of the proposal mentioned in his report; and upon the execution of the settlement, *Margaret Hern* and *George Eshelby* were to be at liberty to intermarry.

The indenture of settlement approved by the Master was dated the 26th of *February* 1829, and was made between *George Eshelby* of the first part; *Margaret Hern*, described as an infant of the age of eighteen years or thereabouts, of the second part; *John Lucas* and *Mary* his wife (formerly *Mary Hern*, and described as the mother and guardian of *Margaret Hern*) of the third part; and *Simson* and *Parrott* of the fourth part. After reciting the will of *Thomas Kelly*, and stating that the bequest of his residuary estate to *Mary Lucas* jointly with

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with *Simson* and *Parrott* had never been accepted by her, *John Lucas* and *Mary* his wife, so far as regarded the legal operation of the said residuary bequest, thereby renounced and disclaimed, and so far as there might have been any assent to the said residuary bequest in respect to *Mary Lucas*, or any acceptance thereof by her or on her behalf, remised and released unto *Simson* and *Parrott* the residuary bequest, and all such legal estate of and in the estates and premises in such bequest comprised, as otherwise might be vested in *John Lucas* and *Mary* his wife, to the intent that the said residuary bequest might take effect in *Simson* and *Parrott*, exclusively of the said *Mary Lucas*. The indenture then witnessed that all the undivided moiety, and all other the part, share, estate, and interest, of or to which *Margaret Hern*, under or by virtue of the will of *Thomas Kelly*, was then or should at any time thereafter, by accruer, survivorship, or otherwise, become or be possessed or entitled, in possession, reversion, or expectancy or otherwise, of or in the testator's residuary freehold, leasehold, and other personal estates, should (subject and without prejudice to the annuity to *Mary Lucas*, and other beneficial interests) stand and be settled, and that *Simson* and *Parrott*, their heirs, executors, administrators, and assigns respectively, should stand and continue seised, possessed, and interested of and in the same, upon trust, after the solemnization of the marriage, with all convenient speed, and within the period of three years from the date of the indenture, if the same could be conveniently effected, but if not, then as soon as might be after the expiration of that period, and either with or without the consent or concurrence of any other person or persons who might be necessary or proper and competent in that behalf, as the particular circumstances of the case might require, to sell and dispose of so much and such part and parts of the said testator's said residuary estate, or of the said

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Margaret Hern's moiety, share, estate, and interest thereof and therein, as should consist of or comprise any freehold or leasehold estates, either by public auction or private contract, to any persons willing to become the purchasers, for the best prices which at the time of such sales might be reasonably had for the same; and for that purpose to enter into, make, and execute all such covenants, contracts, agreements, conveyances, assignments, &c. as to the trustees should seem reasonable and necessary. The indenture contained the usual clause making the trustees' receipts an effectual discharge for the purchase-monies. It was then declared that the trustees should stand possessed of the monies to arise from the sale of the said *Margaret Hern's* moiety of the said premises, upon certain trusts therein stated, for the benefit of *Margaret* during her life, to her separate use; after her decease, for the benefit of *George Eshelby*, during his life, determinable as therein mentioned; and then for the benefit of the children of that marriage, and also of such other children of *Margaret* as she might direct to be let in to participate; failing all such children, then as she should by will appoint, and in default of appointment, for her executors or administrators, in manner therein mentioned.

The settlement was executed and the marriage duly solemnized.

Thomas Hern attained his age of twenty-one years on the 24th of *March* 1830; and, by indenture dated the 14th of *April* 1830, assigned unto *Simson* and *Parrott*, their executors, administrators, and assigns, his moiety and interest, by virtue of the will of *Thomas Kelly*, in the several leasehold premises, being part of the testator's

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tator's residuary estate, upon trusts for sale similar to those contained in the settlement.

An arrangement was at the same time completed, by which the leaseholds were exonerated from *Mary Lucas's* annuity: the other annuitant, *Margaret Doran*, was dead.


On the 26th of *May* 1830, the trustees put up some of the leaseholds for sale by public auction; and at that sale *Jones*, on behalf of himself and the other Defendant *Innes*, became the purchaser of two of the lots, paid the deposit, and signed an agreement for the completion of the purchase. Upon the investigation of the title, it was objected that the settlement, though made under the sanction of the Court, could not bind the interest of an infant in leaseholds for years, limited to her separate use; that the infant, when she came of age, might repudiate the settlement; and that, therefore, a good title could not be made under the power of sale which the parties had attempted to give the trustees. The vendors were advised that the objection was not tenable; and, on the 25th of *November* 1830, they filed a bill for specific performance of the agreement. The Defendants, in their answer, rested their defence on the objection already suggested. *Mrs. Eshelby* was still under age.

Mr. *Bickersteth* and Mr. *Evans*, for the Plaintiffs.

Although the acts of infants, generally speaking, may be void or voidable, according to circumstances, yet marriage agreements are different from all others; and it has been repeatedly decided that settlements of jointures in lieu of dower, and settlements of the personal estate of infants, made by parents or guardians on their behalf,

behalf, before and in consideration of marriage, are conclusively binding upon such infants: *Harvy v. Ashley* (a), *Drury v. Drury* (b), *Theobalds v. Duffoy* (c), *Corbet v. Corbet*. (d)

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Courts of equity possess, and have uniformly exercised, an intrinsic jurisdiction and authority (including and exceeding all the powers recognized as existing in guardians) to deal, in the way of settlement, and for other beneficial purposes, with the property, and more particularly the personal property of infants, without reference to the competency either of the infant or of any other party. No proceeding is more common than for the Court to refer it to the Master to inquire whether a certain arrangement will be for the benefit of an infant; and if he finds in the affirmative, the arrangement is carried into effect, and the infant is bound by it. Here the settlement, having been made, not only with the approbation of the mother and guardian of the infant, but under the deliberate sanction and order of the Court, must be presumed to be, and to have been held to be, beneficial to the infant; and she, therefore, will not be allowed to impeach it. There is no doubt that if the leaseholds had not been limited to her separate use, the settlement would have bound her; and the annexation of that equitable incident to her estate furnishes a ground rather for giving the Court a right of more extensive controul than for excluding its jurisdiction *in toto*. The limitation of interests to the separate use of a married woman is altogether a creature of equity, which the Court modifies and regulates without reference, and, in some particulars, in opposition,

(a) 3 *Atk.* 607.

(c) 9 *Mod.* 102.

(b) 2 *Eden*, 39. 3 *Bro. P. C.*
492. *Toml.* ed.

(d) 1 *Sim. & Stu.* 612. 5 *Russ.*
254.

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opposition, to the principles of the common law ; and a peculiar interest, thus created by the Court, ought not to be allowed to stand in the way of the salutary protection which the Court would otherwise extend to the infant. It would be a singular result that, if the moiety of the leaseholds had been given by the testator to his grand-daughter without any expression of intention on his part to secure the property from the husband, the Court would have carefully settled the property; and yet, the testator having expressed that intention (but without restraining anticipation), that the Court should, for that very reason, abstain from giving her the protection to which she would otherwise have been entitled. If the objection taken to this title prevail, many settlements on the marriage of infants will be invalidated, which have been made on the faith of the competency of parents and guardians, or of the Court of Chancery, to deal with their personal property.

Mr. *Pemberton*, Mr. *Preston*, and Mr. *Stuart*, for the Defendants.

Cases of jointure have no application to the present question. Dower is a provision which the law has given to the wife out of the property of her husband; the law has also provided that that right may be excluded by a jointure; and after considerable difference of opinion, it was finally settled that the lady, though an infant, shall be excluded from dower by a jointure, which her parent or guardian accepted for her as a reasonable provision. But neither parent, nor guardian, nor the Court, has any power to enter into a contract which shall bind the property of a female infant, so as to exclude her from exercising over it those rights which she would otherwise have: *Clough v. Clough* (a),
Durnford

(a) 3 *Wooddeson*, 453. note. 5 *Ves.* 710.

Darnford v. Lane (a), *Slocombe v. Glubb* (b), *Milner v. Lord Harewood*. (c)

1891.

SIMSON
v.
JONES.

A settlement of a female infant's real estate, made on her marriage, does not bind her. It is true that a settlement of her personal estate is binding; but it is binding only as the settlement and contract of the husband, affecting and restricting the interest which he takes in her personal property by his marital right, not as the contract of the wife, limiting any rights which she would otherwise have.* Where personal property is limited to the separate use of a female infant, she is, *quæ* that property, in the same situation as if she were a male; marriage could give the husband no interest in or controul over it; the settlement cannot restrict his rights, for the marriage gave him none; and how can the contract of the female infant give him rights which the marriage could not give him, or deprive her of rights which would remain in her notwithstanding coverture.

Where the Court acts for infants, it acts merely as a trustee: *Ex parte Phillips* (d), *Ware v. Polhill*. (e) The circumstance that the settlement was made with the sanction and under the approbation of the Court, might induce the Court to prevent any person from disturbing

(a) 1 Bro. C. C. 106.

(b) 2 Bro. C. C. 545.

(c) 18 Ves. 259.

(d) 19 Ves. 118.

(e) 11 Ves. 257.

* How will this view of the law be affected by the doctrine which seems to be laid down in *Masscy v. Parker*? (2 Mylne & Keen, p. 174.) If personal property is given to a female unmarried infant to her separate use, and she marries after she attains

twenty-one, does that property vest in the husband, so that he has an absolute power of disposing of it? If it does, what will his rights be, if the infant marries before she attains twenty-one, and without a settlement?

1831.

SINSON
v.
JONES.

disturbing its arrangements, while the minority continues; but if Mrs. *Eshelby*, when she comes of age, chooses to repudiate it, the Court has no power to make it binding upon her.

Mr. *Bickersteth*, in reply.

The MASTER of the ROLLS.

In this case, a settlement is made, on the marriage of the infant, of leaseholds which were already secured to her separate use, and the question is, whether that disposition shall prevail. I am of opinion that the question is to be decided on the general principle, that an infant is incapable of contract or alienation.

Where a female infant possessed of personal property marries, and a settlement of that property is then made, the settlement operates, not as a contract by the wife, but as a limitation by the husband of his marital rights. Accordingly, no settlement or contract for a settlement, made on the marriage of a female infant, can affect her interest in her freehold estates.

It has been argued that the settlement was made after a reference to the Master, and with the approbation of the Court. Where an infant is bound to elect, the Court will decide for the infant what election ought to be made: but this Court has no authority to give an infant a power of alienation, even for her own benefit.

I am of opinion that the trustees cannot make a good title; and the bill must be dismissed with costs.

A com-


A communication having been made to the Master of the Rolls, that some of the parties were anxious for a more full explanation of the grounds of his decision, his Honor gave the following judgment.

1831.
SIMSON
v.
JONES.
March 23.

The testator, *Thomas Kelly* by his will gave to his grandson and grand-daughter, *Thomas Hern* and *Margaret Hern*, afterwards *Margaret Eshelby*, their executors, administrators, and assigns, the equitable interest in certain leasehold estates, to be equally divided between them as tenants in common; to be a vested interest as to the grandson when he should attain twenty-one, and as to the grand-daughter when she should attain twenty-one or marry, which should first happen; but to be to her separate use, independent of any husband whom she might happen to marry. The grand-daughter being made a ward of Court, and the Court having, in contemplation of her intended marriage with *George Eshelby*, referred it to the Master to approve of a proper settlement of her fortune, a certain indenture of settlement was, in pursuance of the Master's report, made and executed by and between the said *George Eshelby* of the first part; the said *Margaret Hern*, the intended wife, therein described to be an infant of the age of eighteen years, of the second part; and *Mary Lucas*, the mother and guardian of the said *Margaret Hern*, of the third part; whereby it was declared that the said *Margaret Hern's* moiety of the said leaseholds should continue and be vested in the Plaintiffs, who were the trustees under the will of the said testator, *Thomas Kelly*, upon trust to sell and dispose of the same as soon as conveniently might be, and to stand possessed of the monies to arise from such sale upon the trusts therein mentioned.

By a certain other indenture the moiety of the grandson in the said leaseholds was in like manner continued and vested in the said trustees for the like purpose of sale.

1881.


SIMMON
v.
JONES.


In pursuance of these indentures the Plaintiffs, the trustees, put up for sale the leasehold premises by public auction on the 26th of *May* 1880 ; and the Defendants, *Jones* and *Innes*, became the purchasers of part of the property, and signed agreements in writing accordingly; but, they having afterwards refused to complete their purchase, on the ground of a defect in the title as it regarded the moiety of the grand-daughter, the present bill was filed by the Plaintiffs for the specific performance of the contract.

The question is, whether by the settlement made under the order of the Court, a power of sale of *Mrs. Eshelby's* moiety of the leaseholds is well vested in the trustees, she being still an infant.

The general personal estate of a female infant is bound by a settlement made on her marriage, because such personal estate becomes by the marriage the absolute property of the husband, and the settlement is in effect his settlement, and not hers. It is now established that the real estate of a female infant is not bound by the settlement on her marriage, because her real estate does not by the marriage become the absolute property of the husband, although by the marriage he takes a limited interest in it. The leasehold estate in question being given to the separate use of the wife, the husband takes no interest in it; and if the power of sale is well created, it is by the act of the infant. It is not contended that she would be competent to create such a power, if the settlement had not been made with the approbation of the Court; and the question, therefore, is, whether the Court has jurisdiction to give to a female infant the power of disposition of her separate property during her infancy, by a settlement made in contemplation of her marriage.

Whatever

Whatever doubts may have been entertained on the subject formerly, I take it to be clear that the real estate of a female infant would not be bound by a settlement made with the approbation of the Court; and it appears to me to follow that the same principle is applicable to personal estate settled to her separate use. By the rule of law, she has no power of disposition during her minority; and this Court has, I think, no jurisdiction to give her such power, and I am not aware that any case is to be found in which the Court has attempted to exercise such a jurisdiction. A female infant is bound by the settlement made on her marriage, as to her whole and thirds — not by force of her agreement in the settlement — but by reason of the consent of her parent and guardians, and of the statute of *H. 8.* When the Court makes an election for an infant, it does not enable the infant to exercise a disposing power over her property, but merely supplies in her that discretion in her choice, which by reason of her infancy she is supposed to want. I am of opinion, therefore, that a good title cannot be made, unless by the confirmation of the wife when she attains the age of twenty-one, and the bill must therefore be dismissed.

1881.

 SIMON
 v.
 JONES.

A petition of appeal to the House of Lords was presented; but it was afterwards abandoned, as the lady, when found, would be of age, and would have the power of confirming the settlement, before the appeal could be disposed of.

1831.

ROLLS.

Jan. 20.

Feb. 15.

L. C.

Nov. 15.

A gift over of money upon the death of a legatee without issue is void, unless from the words of the will it can be collected that the testator meant a death without issue at the time of the death of the legatee.

A testator gave to his brother 300*l.* per annum during his life, and to each of two nephews 150*l.* during their lives; but if either of the nephews died, the other to inherit the whole 300*l.*; and if the brother died without issue, the two nephews to inherit from the brother: and he then proceeded to state that the reason why he

left only the interest to his brother and two nephews was, that, if they died without issue, the money might go to his three cousins, to be divided equally between them: the brother and nephews all died without issue: Held, that the gift over to the cousins was void, as being too remote.

LEPINE v. FERARD.

ZACHARIAH AGACE made his will, dated the 3d of November 1775, which was partly in the words following: — “I give and bequeath to my brother *Jacob Agace* 1000*l.*; I give and bequeath a further sum to my brother *Jacob Agace*, during his life, 300*l.* per annum; I give and bequeath to my nephew, *Zachariah Agace*, during his natural life, 150*l.* per annum; I give and bequeath to my nephew *Daniel Agace*, during his natural life, 150*l.* per annum; and in case either of my nephews should die, the other to inherit the whole 300*l.*; and if my brother *Jacob Agace* dies without issue, then my two nephews, *Zachariah Agace* and *Daniel Agace*, to inherit from my brother *Jacob Agace*. I also give and bequeath to my aunt, *Mary Agace*, 25*l.* per annum; I also give and bequeath *Mrs. Temperance Cole* 25*l.* per annum; these last are only for life, then to my dear wife. The reason why I leave only the interest to my brother *Jacob* and my two nephews is, that if they die without issue, the money may go to my relations, to be divided between my cousins, *James Legrew*, *Mrs. Susan Godard*, widow of *John Godard*, and *Mrs. Esther Privo*, wife of *Mr. Nicholas Sebire*, three shares equally alike.” The residue of his estate he gave to his wife *Martha*.

The testator died in the year 1778.

A sum

A sum of 20,000*l.* 3 per cent. consolidated Bank annuities was set apart to provide for the 300*l.* a year and the two payments of 150*l.* a year given by the testator to his brother and two nephews. *Jacob Agace* died in the year 1782 without issue; from which time the dividends of the 20,000*l.* stock were divided equally between the two nephews. *Zachariah Agace* died without issue; and *Daniel Agace* received the 600*l.* a year till the year 1828, when he also died without issue.

1831.
LEPINE
v.
FERARD.

The bill was filed by the representatives of *James Legrew*, *Susan Godard*, and *Esther Privo*, who were all dead, against the personal representatives of the testator, who were also the personal representatives of his widow and residuary legatee, and of *Daniel Agace*, the survivor of the nephews. It prayed a declaration that the Plaintiffs were entitled in equal shares to the monies invested for securing the three annuities.

The Defendants, by their answer, submitted that the gift over to the cousins was too remote, being a gift on a general failure of the issue of the brother and the two nephews.

Mr. *Bickersteth* and Mr. *Lovat*, for the Plaintiffs.

The question is, whether the gift to the three cousins is to take effect only on a general failure of issue of the brother and nephews, or on a failure of their issue in their lifetime. Here there are two circumstances which shew that the testator meant a failure of issue in the lifetime of the brother and nephews. First, the fund is not given absolutely to the brother and the nephews; the interest of it only is given to them for life in the particular manner pointed out in the will; and when the testator professes to assign a reason for the disposition

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which he makes of the property after their death, he must be understood to speak with reference to the state of things which might exist at their death. The testator in effect says, 'My intention is that the capital of the fund, which is to provide for these annuities, is to go, at the death of my brother and nephews, if they die without issue, to my three cousins.' Can any person doubt that 'death without issue,' in such a disposition, must have reference to the death of the survivor of the brother and nephews? Secondly, in the preceding part of the will, "dying without issue" is a phrase used to denote not a general failure of issue, but a failure of issue within the compass of a life in being. When the testator says "if my brother *Jacob Agace* dies without issue, then my two nephews, *Zachariah Agace* and *Daniel Agace*, to inherit from my brother *Jacob Agace*," he unquestionably means to refer to a failure of issue of *Jacob Agace* at his death, and in the lifetime of the two nephews. Such is the construction of the will, which all parties have acted upon; and if "dying without issue" be held, in this passage to denote a general failure of issue, the limitation over of the 300*l.* a year to the nephews during their lives, would be open to the same objection which the Defendants raise to the claim of the representatives of the cousins. In like manner, when the testator says, "in case either of my nephews should die, the other to inherit the whole 300*l.*," he plainly refers not to the death of one of the nephews at any time, but to the death of one of them in the lifetime of the other. Finding in the will, that, when dying is mentioned, it means dying in the lifetime of 'the other of two persons,' and that when dying without issue is mentioned, it denotes not a general failure of issue, but a failure of issue in the lifetime of the nephews; the fair inference is, that when the testator has given the interest of a fund to a brother and nephews for life, and

and proceeds to limit it to other persons, if they die without issue, he intends a failure of issue in the lifetime of the survivor of the brother and nephews.

1831.

 LEPTINE
 v.
 FERRARD.

Mr. Pemberton, *contra*.

The testator has given annual sums to his brother and two nephews, so that the surviving nephew takes the whole; and upon their death without issue, he has limited over the capital to his cousins. "Death without issue" denotes a general failure of issue, whether as used in reference to real or personal estate, unless there be something in the will to shew plainly a different intent: *Love v. Windham* (a), *Dingly v. Dingly* (b), *Burford v. Lee* (c), *Boden v. Watson* (d), *Boehm v. Clarke* (e), *Barlow v. Salter* (g), *Ward v. Bevil* (h); *Fearne on Contingent Remainders*. (i)

In this will there is nothing to limit the failure of issue to a particular time. The circumstance that the brother and nephews have an interest which expires with their lives cannot have that effect, unless it is to be said, in opposition to settled rules, that if personal property is given to A. for life, and if A. dies without issue, to B., the remainder to B. is not too remote. When the testator, in the preceding part of the will, says, "if my brother *Jacob Agace* dies without issue, then my two nephews *Zachariah Agace* and *Daniel Agace* to inherit from my brother," there is a plain implication that he refers — not to failure of the brother's issue generally — but only to failure of his issue in the lifetime of the nephews; because it is evident from the subsequent part of

(a) 1 *Lev.* 290.

(b) 2 *Freem.* 40.

(c) 2 *Freem.* 210.

(d) *Amb.* 398.

(e) 9 *Ves.* 580.

(g) 17 *Ves.* 479.

(h) 1 *Yo. & Jerv.* 512.

(i) p. 444.

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LEPINE

v.

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of the will that the nephews are to take only for life, and, consequently, the event, on which they are so to inherit, must be an event which is to happen in their lifetime. But the will does not furnish any circumstance of this kind, which can have the effect of limiting to particular lives the failure of issue, on which the capital is given over.

Mr. *Bickersteth*, in reply.

In none of the cases cited did the person, on whose failure of issue the limitation over was to have effect, take only an annuity. Besides, the rule of law is not controverted; and the question is, Does not enough appear on the face of this will to shew, that the failure of issue on which the cousins were to take the capital which yielded the annuities, when the annuities expired, was a failure of issue in the lifetime of the surviving nephew.

Feb. 15.

The MASTER of the ROLLS.

The question in this cause is, whether, upon the true construction of the will, it appears to be the intention of the testator that the death without issue of the three annuitants is to be a death without issue generally, or a death without leaving issue living at the time of the death.

In directing that, in case either of his nephews should die, the other is to inherit the whole 300*l.*, it is plain, from the subsequent passages in the will, that the testator means only that the survivor shall take the annuities of 150*l.* each for his life. So, in directing that if his brother *Jacob* should die without issue, then his

two

two nephews should inherit from his brother, he in like manner means that his two nephews shall take between them the 300*l.* for life; and in this case the words "without issue," meaning a death without issue in the lives of his nephews, the limitation over to them would be good. But when, in the subsequent part of the will, he gives the money which would produce the annuities to the persons represented by the Plaintiffs, in case of the death of his brother and two nephews without issue, there are no words which can authorise a court to declare that he meant death without issue living at the time of the death of his brother and nephews, any or either of them.

1881.
LEFNER
v.
FRANK.

The Plaintiffs appealed from his Honor's decision.

Nov. 15.

The *Solicitor-General*, Mr. *Lovat*, and Mr. *Sidebottom*, in support of the appeal.

The Court has always been astute to discover and give effect to any circumstances and expressions in a will, from which an intention can be collected to cut down the legal signification of the words, "dying without issue," and to restrict it to the popular sense of death without issue in the lifetime of the first taker. Even trivial expressions have been held sufficient for this purpose, where the obvious intention required such a construction. *Pinbury v. Elkin* (a), *Nichols v. Hooper* (b), *Wilkinson v. South* (c), *Trotter v. Oswald* (d), *Chamberlain v. Jacob* (e), *Gawler v. Cadby*. (g) The expression, "to inherit from my brother," is surely as strongly indicative of an intention to confine the failure of

(a) 1 *P. Wms.* 563.

(d) 1 *Cox*, 317.

(b) 1 *P. Wms.* 198.

(e) *Amb.* 72.

(c) 7 *T. R.* 555.

(g) *Jac.* 346.

1831.

LEPINE
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of issue to the lifetime of the brother, as the words "then after her decease," or "at their death," upon which *Pinbury v. Elkin* (a), and *Rackstraw v. Vile* (b), were determined in favour of the limitation over. *Prima facie*, indeed, there is every probability that the nephews, who were to inherit the annuity of 300*l.* from the testator's brother, were intended to take the same interest in that as they were to take in their own annuities; and these were expressly annuities for their lives only. The subject-matter of the gift, besides, is not a sum of money in gross, but simply the interest of a fund, or rather, annuities of a definite amount, with respect to which it seems the natural and probable intent, even if the testator had not in the subsequent clause assigned a reason for the peculiar form of his bounty, that, upon the death of all the annuitants leaving no issue, the rights of the legatees over, which were to be contingent on that event, should immediately take effect.

Assuming, then, that the nephews took no more than life interests in the annuities, not enlarged by any subsequent words into *quasi* estates tail, the limitation over being expectant upon mere life estates, would have the effect of cutting down the failure of issue on which it was made to depend, to a failure on the dropping of the lives. This doctrine, which appears to have the sanction of Lord *Hardwicke* in *Trafford v. Boehm* (c) is highly reasonable in itself; for as by the supposition the nephews took estates for life only, and their issue could take nothing by implication as purchasers, the time to which the failure of issue spoken of must of necessity be referred, is the time when the life interests were to cease.

Sir

(a) 1 *P. Wms.* 563.(c) 3 *Atk.* 440.(b) 1 *S. & St.* 604.

Sir *E. Sugden* and Mr. *Preston*, for the Defendants.

1831.

LEPINE
v.
FERARD.

The general rule, as laid down by Lord *Eldon* in *Chandless v. Price* (a), is undisputed; that wherever “the words would raise an estate tail in real estate they will give the absolute property in personalty, and if there is no distinct expression to restrain it to the time the law allows, the consequence must prevail, whatever is the intention.” The words “inherit from my brother” cannot operate to confine the estate given to the nephews in the annuity of 300*l.* to mere life interests. The nephews were to take what the brothers had enjoyed, by a sort of succession from him; but it was not necessarily immediate succession, and the expression would be equally appropriate if the property which they were to inherit were to devolve on them from the brother after his issue had become extinct. To the Plaintiffs, however, it is quite immaterial whether the testator’s nephews took a mere life estate or an absolute interest. In either view the gift over is too remote, being limited after a general failure of issue of the first taker. It might have been a question whether, if the nephews had left issue, their estate was enlarged by the effect of the limitation in case of their death without issue to a quasi estate tail, as in *Love v. Windham* (b); or whether the issue would take by implication as purchasers (c). But with that the Plaintiffs have no concern; nor is it any argument in favour of their present pretension that there is no person *in esse* before them who is capable of taking, so long as the event upon which alone their interest is to arise is too remote; and of that it is impossible to raise a doubt; for it is plain, upon the language of the clause assigning the reason for the gift, that

(a) 3 *Ves.* 99.

2 *Mad.* 449., *Andree v. Ward*,

(b) 1 *Lev.* 290.

Greene v. Ward, 1 *Russ.* 260.

(c) See *Ex parte Rogers*,

1831.

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that while any issue of the nephews were in existence the cousins were to take nothing.

The testator obviously had two intentions, one, that his nephews should have the annuities for their lives; the other, that in some way or other their issue, if they had any, should be permitted to enjoy the capital of the fund: and to accomplish that object, the Court would probably hold the life estates to be enlarged so as to give the children a benefit through the medium of their parents. At any rate it is admitted, that if the nephews left issue, the claim of the plaintiffs would be excluded; although that exclusion, if the argument on the other side be sound, would be of no benefit to the issue, and would, therefore, be irrational and absurd. No such doctrine as has been supposed is to be found in *Trafford v. Boehm* (a); nor has it ever been established in any case, that because the estates first given are life estates, and the limitations over (not being mere life interests) are made to depend on a failure of issue of the first takers, the failure of issue referred to is a failure of issue at the death of the first takers. The proposition supposed to be stated in that case was, that the circumstance of the limitations over being for life only (which is not the case with which the Court has now to deal, for the gift over to the cousins is of the *corpus* of the fund) was to be considered as warranting an inference that the specified failure of issue was a failure at the death of the first taker; and that proposition which could have no application here, and which never had the sanction of Lord *Hardwicke*, is completely exploded by Sir *W. Grant* in *Boehm v. Clarke* (b) and *Barlow v. Salter* (c), authorities which dispose of the present question.

It

(a) 3 *Atk.* 440.(b) 9 *Ves.* 530.(c) 17 *Ves.* 479.

It has been repeatedly decided, and is now settled law, that with reference to the effect of a bequest to a man for life, and if he die without issue, the principal to go over, it makes not the slightest difference whether the bequest is of the interest of money or of money itself. (a) *Butterfield v. Butterfield* (b), *Everest v. Gell*. (c)

1831.
LEPINE
v.
FERARD.

The Solicitor-General, in reply.

The LORD CHANCELLOR.

I have no doubt whatever that taking the whole together this is a limitation upon a general failure of issue, and that the executory bequest is consequently void. I will take it in two ways; first, supposing the bequest to have stood without the superadded words, "the reason why," &c.; and secondly, importing those words into the consideration of the question.

In the first place, it is clear, if the bequest to the cousins if the brother and nephews should die without issue had stood alone, without the clause explaining the nature and object of the prior gift, that according to the authority of all the cases, and to what is now admitted to be the clear law, it would have been void as being a limitation after a general failure of issue; and that in that respect it makes not the least difference whether the first legatee took an express estate for life, or whether he took a larger interest. In either case the failure of issue spoken of is construed to be a failure of issue at any period of time, the first estate is held to be enlarged by implication into an absolute interest, and the limitation over is void for remoteness.

This

(a) *Fearne's C. R.* p. 475.

(c) 1 *Ves. jun.* 286.

(b) 1 *Ves. sen.* 133, 154.

1831.

LEPINE
v.
FERARD.

This doctrine has been so fully established by the case of *Love v. Windham* (a), where the estate of the first taker was expressly a life estate; and by two cases in *Freeman* (b), where the gift to the first taker was to him generally without being so restricted, that it is unnecessary to do more than refer to it now.

The next consideration is, whether any substantial distinction can be founded on the subsequent clause: — “The reason why I leave only the interest to my brother *Jacob* and my two nephews is, that if they die without issue the money may go to my relations.” That clause seems to me rather to strengthen the respondent’s argument that the cousins were entitled to take nothing so long as any issue of the nephews were in existence, and that a general failure of issue therefore was in the testator’s contemplation. I will assume, however, as has been argued at the bar, that this clause, coupled with the rest of the instrument, clearly shews that the nephews to whom the annuity of 300*l.* was given over in the event of the brother dying without issue were to take by the gift a life interest only. The observations of Lord *Hardwicke* in *Trafford v. Boehm* (c), which have been referred to, were originally misapprehended by Sir *W. Grant* in his remarks upon that case in *Boehm v. Clarke* (d); but he afterwards took an opportunity, when giving judgment in *Barlow v. Salter* (e), to correct his mistake, and at the same time to deny the proposition which Lord *Hardwicke* had been supposed to lay down, that where the gift over is for life merely, that limits the failure of issue on which the subsequent gift is made to depend to a failure at the death of the first taker.

This

(a) 1 *Lev.* 290.

(b) *Burford v. Lee*, 2 *Freem.*
210., and *Anon. ibid.* 287.

(c) 3 *Atk.* 440.

(d) 9 *Ves.* 580.

(e) 17 *Ves.* 479.

This proposition, so far from deriving any countenance from the judgments of Sir *W. Grant* in *Boehm v. Clarke* and *Barlow v. Salter*, is directly opposed to them. At all events, it is not easy to see what bearing it can have upon a case like the present, where the gift over with which the Court has to deal is a gift to the cousins, in terms which would carry an absolute interest in the fund. The rest of the cases referred to on behalf of the appellants appear to me to have no application.

1831.
LEPINE
v.
FERARD.

It is not necessary for the present purpose to decide, and it was not necessary for the defendants to argue the question, whether the nephews took mere life estates, or whether they took absolute interests; although looking to the wording of the clause in which the testator assigns the reason for the peculiar form of his gift, the words seem to import a general failure of issue, and strongly favour the opinion that they took absolute interests. The judgment of his Honor must be affirmed.

1831.

July 12. 26.


CAMPBELL v. HARDING.

A testament by his will gave to Caroline, described as his natural daughter, a sum of stock, and his house and land at C. with a direction that if she married, the property should be settled upon herself and children; but, in case of her death without lawful issue, the money so left to her to be equally divided betwixt his nephews and nieces who might be living at the time, and the land at C. to his nephew J. H.: Held, that Caroline took an absolute interest in the stock.

JOHN HARDING by his will duly attested, gave and bequeathed as follows:—“To my adopted daughter, commonly called *Caroline Harding* [described in another part of the will as his natural daughter], the sum of 20,000*l.* 3 per cent. consols, and my house and landed property at *Culworth*, also of *Morton Pinkney*: but in case of her death without lawful issue, I then will the money so left to her to be equally divided betwixt my nephews and nieces who may be living at the time: and the land &c., at *Culworth*, to my nephew, the Rev. *J. Harding*; and that at *Morton Pinkney*, to my nephew, Lieut. *John Harding*. And I request my much-esteemed friends, *Robert Campbell, Esq.*, and *Daniel Stuart, Esq.*, to be the guardians, and allow whatever they please for her education annually; and after she has left school, and if she marries, it must be with their consent, and the property to be solely settled upon herself and children, and in no way changed or alienated. * * * * * I leave to each niece and nephew of mine the sum of 1000*l.*; and to *Charlotte Ann Harding*, my niece, daughter of my late brother *Francis*, the sum of 3000*l.*: but in case of her death without issue this 3000*l.* to revert back, and to be divided betwixt my nephews and nieces who may then be living. * * * * * What property I may die possessed of, not otherwise appropriated, I divide into fifteen shares, seven of which to be for my brother *William*, and after him, to his seven children; five for my sister *Candy*, and after her, to her five children; and the remaining three to my sister *Wright*, and her children afterwards.”

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One of the questions in the cause was, whether the 20,000*l.* stock bequeathed to *Caroline Harding* vested in her absolutely, or whether she took it subject to an executory bequest over. The Vice-Chancellor decided that *Caroline Harding* took an absolute interest in the stock, and that the bequest over, being limited after a general failure of issue, was void.

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Subsequently to the date of the Vice-Chancellor's decree, *Caroline Harding* died, an infant, unmarried, and without issue; leaving a will, of which her guardians, the Plaintiffs *Campbell* and *Stuart*, were appointed executors. *Charlotte Ann Harding* shortly afterwards intermarried with *John Pulman*; and the suit having been duly revived, the present appeal was brought by the Defendants claiming interests in the 20,000*l.* stock under the limitation over to the testator's nephews and nieces.

Mr. Twiss, Mr. Teed, and Mr. Hodgkin, in support of the appeal.

It is not denied that if the words, "in case of *Caroline Harding's* death without issue," had stood unexplained, they must according to settled decisions be taken, not in their natural sense as meaning "in case she leaves no issue at the time of her death," but in their legal sense, as importing the failure of her issue whenever that may happen, however long after her natural death; but as this technical construction frequently defeats a testator's intent in favour of the legatees over, by enabling the first taker, having no issue, to dispose of the property to strangers, the Court, more especially in cases of personal estate where technicalities are less regarded, eagerly catches at any thing in the will, which, by indicating that the vesting of the ulterior interests is not to be postponed to the indefinite and possibly

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remote period when the first taker's issue shall be extinct, raises an inference that the failure of issue spoken of is to be referred to a definite and not very distant period, such as the happening of the first taker's death, or the determination of some other life or lives in being. In favour of this, which has been called the natural and grammatical sense of the words (a), Judges have always felt a strong leaning; and they have, therefore, been anxious and astute to discover words or circumstances in the instrument itself which would justify them in departing from the technical construction, and in restricting the event on which the ulterior gift is made to depend to a period within which, by the rules of law, it may be capable of taking effect (b).

This will may be considered with reference either to the provisions specifically made for *Caroline Harding* herself, or to the general scope of that part of the instrument with which her interest is not expressly connected; and, considered in either view, it furnishes strong grounds for construing the words "death without issue" according to their natural rather than their legal import.

In order to give effect to every part of a will, the collocation of the clauses or limitations may be disregarded, provided the Court can, by transposing them, deduce a consistent and intelligible disposition from the whole; *Anon.* (c), *Ridout v. Dowding* (d). Now this testator's primary object was to provide for *Caroline Harding* and her issue; and if she should have no issue, then to provide for his nephews and
 nieces.

(a) *Bigge v. Bensley*, 1 Bro. C. C. 187.

(b) *Fearne Cont. Rem.* 471.

(c) *Cro. Eliz.* 9.

(d) 1 *Atk.* 419.

nieces. After bequeathing in general terms 20,000*l.* stock to *Caroline*, and if she should die without issue, to his nephews and nieces, the testator proceeds to qualify the bequest. He makes provision for the three events of her marrying, of her having children, and of her dying without issue. To take these events in their natural order; the will first requires that if she marries it shall be with the consent of her guardians; secondly, as to her children, the property is to be solely settled upon herself and children, and in no way changed or alienated. So far, therefore, from being intended to have any absolute interest in the fund, she was not to anticipate a single shilling of it. It was to be put in settlement, — solely settled upon herself and children. A settlement framed in conformity with this direction would necessarily restrict her to a mere life interest in the event of her leaving children; and even if she died childless before any settlement was made, her death without children would vest in her no ultimate disposable interest. If the property had been land, such a disposition as this direction for a settlement implies would give an estate to the children as purchasers, and to her only a life estate, without any subsequent estate in tail or in fee to arise in default of children; *Ginger v. White (a)*. Besides the two first events provided for, the marrying and the leaving children, there might also be a third — her death without having had any children to take under the contemplated settlement. The testator accordingly goes on: — “in case of her death without issue, I then will the money to my nephews and nieces living at the time.” In what sense of death without issue? Plainly in that sense, and with reference to that object which had been already considered; — with reference to such

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such issue as were to take under the settlement, viz., children. That was the construction supported in *Ginger v. White*, where the words "without issue" were held to mean, "without the class of issue before mentioned in the same will," that is, without children. So in *Goodright v. Dunham* (a), *Hockley v. Mawbey* (b), *Blackborn v. Edgley* (c). That the will here sets out with general words of gift to *Caroline Harding* is immaterial; for if the argument be well founded, that the wording of the ulterior bequests is strong enough to exclude the construction of a general failure of issue, those bequests are not too remote, but will be upheld as good executory limitations, notwithstanding that the previous gift purports to be absolute. Such would be the inference even if the property here disposed of were real estate: in personalty the Court leans much more strongly to support the bequests over; *Doe v. Lyde* (d), *Salkeld v. Vernon* (e), *Vandergucht v. Blake* (g). In no case where the word "issue" would bear the sense of children, has the law construed the expression, "in case of the first taker's death without issue," as importing indefinite failure, and consequently enlarging the first taker's life estate into an absolute interest. These provisions, therefore, are significant indications that death without issue, meaning death without having had any such issue as would have taken under the settlement, and not death without issue indefinitely, was the event in the testator's contemplation.

Referring next to that portion of the will which relates less particularly to the interests of *Caroline Harding* than to the general disposition of the testator's property, the frame and character of the provisions

are

(a) *Doug.* 264.(b) 1 *Ves.* jun. 142.(c) 1 *P. Wms.* 600.(d) 1 *T. R.* 593.(e) 1 *Ed.* 64.(g) 2 *Ves.* jun. 534.

are even stronger in favour of giving the restricted construction to the dying without issue upon which the contingent interests of the nephews and nieces are limited to arise. The testator, it is observable, provides only for his nephews and nieces living at the date of his will; in describing them he uses the word "my," which necessarily confines the class so designated to the individuals standing in the specified relation at the time when the will speaks; as much so as if they had been enumerated by name. With no correctness of speech, indeed, could the relationship of uncle and nephew be said to subsist between the testator and the then unborn children of his brothers and sisters. The Master's report finds who the nephews and nieces were, viz., seven *Hardings*, five *Wrights*, and three *Candys*, making with *Charlotte Ann Harding* sixteen in all, and that they all survived the testator.

The testator indicates no intention of providing for any not already in existence. This is clearly to be inferred from the gift of 3000*l.* to *Charlotte Ann*, and of 1000*l.* to each of the others. The nephews and nieces who take the 1000*l.* a piece, can be those only who were living in the testator's lifetime; and the nephews and nieces mentioned in the same sentence, among whom the 3000*l.* are to be divided in case of *Charlotte Ann's* death without issue, must, of course, be the same individuals who are each to take the 1000*l.* legacies; in other words, those living at the testator's death: and as, moreover, it is expressly provided, that in order to participate in *Charlotte Ann's* 3000*l.* legacy, they must be living at her death, the gift of the 3000*l.* to those nephews and nieces is a gift confined to persons *in esse*. That being so with respect to the legacy given over upon *Charlotte Ann's* death without issue, the same intent must be presumed as to the 20,000*l.* stock given

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over upon the death of *Caroline* without issue. The phrase "revert back" points in the same direction. The testator might naturally speak of money reverting back to individuals already existing, and specified in the will, and whose general residuary provision of fifteen shares had been so far diminished by the setting apart of 3000*l.* for *Charlotte Ann.*; but he would hardly say the money was to *revert back* to persons not mentioned in any of his provisions, and not yet in existence. These circumstances, which negative any intent to admit after-born nephews and nieces, are material in this view, — that as the gift of 20,000*l.* is confined to those who may be surviving at the time of *Caroline's* decease without issue, the failure of her issue is so restricted that it must happen, if at all, during the lives of nephews and nieces existing at the testator's death, — within the compass of lives in being. Had the testator contemplated a general failure of issue, a failure for instance a century after his death, it would have been absurd in him to confine his bequest to those of his nephews and nieces who should be living at the time: he must, therefore, have meant either failure of issue at the time of his daughter's death, or failure of issue within such a time as might not improbably arrive during the lives of some of the nephews and nieces. The case would then fall directly within the principle of *Pells v. Brown* (a); for there is no difference between the words "if *Caroline* die without issue, then to my nephews living at the time," and the words "if she dies without issue, living my nephews, then to those nephews." So in *Lamb v. Archer* (b), the limitation over to *B.*, if *A.* died without issue, living *B.*, was held good, because the contingency, if it took effect at all, could only take effect within the compass of a life: *Nicholls v. Skinner*.

(a) *Cro. Jac.* 590.(b) 1 *Salk.* 225.

Skinner (a). Upon this construction *Caroline* would take an absolute interest in the stock, subject to an executory bequest over, in the event of her death and the failure of her issue during the lives of the sixteen nephews and nieces.


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This argument assumes that the language of the will is such as not to admit after-born nephews and nieces; but even supposing the words were large enough to include them, so that the failure of *Caroline's* issue after her death might, by an unlooked-for addition to the family of one of the testator's brothers or sisters, be after her decease postponed beyond the compass of lives in being, that circumstance would not affix to the words the sense of an indefinite failure of issue. Children *in ventre sa mere* are, for the purpose of taking, held to be *in esse*; and upon this principle the vesting of the interest might possibly be postponed: but the postponement could be for a very brief period only; for any nephews or nieces of the testator must of necessity come *into esse* within nine months after the decease of his brothers and sisters (and the parents of those brothers and sisters are admitted to have been long since dead), and therefore the gift over would still be within the compass of lives in being. In *Doe v. Webber (b)* the Court considered a direction in the will, that the devisee over should pay 1000*l.* to such person as the first taker should appoint, or to the first taker's executors, as a sufficient indication that the failure of issue contemplated was a failure at the first taker's death, and not at an indefinite period; inasmuch as the provision respecting the 1000*l.* was a personal trust left to the discretion of the first taker, a living person; *Keily v. Fowler (c)*.
In

(a) *Prec. Ch.* 528., corrected
from the Reg. Book, 2 *Meriv.* 135.

(b) 1 *B. & Ald.* 715.

(c) 3 *Bro. P. C.* 299. *Wilm.* 298.

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In *Murray v. Addenbrook* (a), the Court supported a limitation over on failure of issue male, on the ground that these words were to be considered, upon the whole context of the will, as equivalent to the words "if there shall be no son then living." And the decision of the Master of the Rolls in the very recent case of *Malcolm v. Taylor* (b) proceeded upon the same principle.

But the words "living at the time" warrant a construction which, besides bringing the period of vesting to a nearer and more definite point, is also the most obvious and natural, and therefore preferable to the one which has hitherto been contended for, — that the property, in case of *Caroline's* decease without issue, shall go to those nephews and nieces who may be living at the time, — at the time, that is, of her departing this life. On this construction, it becomes immaterial whether the words of the will be deemed capable of admitting after-born nephews and nieces; for then all who take, whether born before or after the testator's death, take vested interests immediately on the expiration of a life in being, viz., the life of *Caroline*. That such an effect may be properly imputed to the words "living at the time," is shewn by a great variety of cases, in which expressions of a similar and certainly not stronger kind, such as, "then after," "immediately after," and "leaving," have been held to cut down the failure of issue, previously spoken of in general terms, to a failure of issue at the time of the first taker's decease; *Pinbury v. Elkin* (c), *Keily v. Fowler* (d), *Roe v. Jeffery* (e), *Wilkinson v. South* (g). These considerations apply with peculiar force,

(a) 4 Russ. 407.

(b) Page 416. *infra*.


(c) 1 P. Wms. 563.

(d) 3 Bro. P. C. 299. *Toul. ed. Wilm.* 298.

(e) 7 T. R. 589.

(g) 7 T. R. 555.

force, when it is recollected that *Caroline* was an infant, and, as appears upon the face of the will itself, a natural child; and that the testator had therefore an additional motive for anxiously providing, by an effectual limitation over, against the otherwise not improbable contingency of the legacy falling to the crown by her dying intestate and without issue; *Gawler v. Cadby* (a).


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As this will, then, after using words which, had they stood alone, would have given to *Caroline* an absolute interest in the 20,000*l.*, has gone on to qualify those words by clauses directing the property to be given to her children as purchasers, if she should have children, and if not, then to the nephews and nieces, it is clear from those qualifying clauses that the testator did not intend her in any case to take an absolute interest. By deciding that her interest is absolute, the Court would at once annul all the words and clauses relating to the 20,000*l.*, except the words "20,000*l.* to *Caroline Harding*," and every thing that follows might just as well have been omitted or expunged. But if, on the other hand, either of the constructions contended for be adopted, effect is given to every part and provision of the instrument, the limitation over is valid and operative, and all the intentions of the testator will be fulfilled.

Sir *E. Sugden* and Mr. *Mathews*, in support of the decree, contended that the case fell clearly within the general rule, as established by the two authorities in *Freeman* (b), on which the judgment of the Vice-Chancellor had mainly proceeded; and that the circumstances on which the appellants relied as creating a distinction in their favour were insufficient, considered either

(a) *Jac.* 346.

(b) *Burford v. Lee*, 2 *Freem.* 210., and *Anon. ibid.* 287.

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either singly or collectively, to justify the Court in cutting down the general failure of issue on which the gift over was limited to a failure of issue living at the death of *Caroline Harding*; *Bigge v. Bensley* (a), *Barlow v. Selter* (b). It could not be disputed that, by the terms of this devise, *Caroline Harding* took an estate tail in the landed property; and that it was an established principle, subject only to the exception upon the effect of the word "leaving," that wherever the words would raise an estate tail in real estate, they would carry an absolute interest in personalty. The particular circumstances and expressions referred to as a ground for construing the death without issue upon which the limitation over to the nephews and nieces was to take effect, to be a death without issue, in the lifetime of *Caroline*, were much more slight and equivocal than in any of the cases where such a construction had been adopted. *Pinbury v. Elkin*, and *Roe v. Jeffery*, were anomalous cases, and, perhaps, would hardly be followed at the present day; but even if their authority were admitted, they could not govern the case before Court. The cases of *Blackborn v. Edgley* (c), *Ginger v. White* (d), *Malcolm v. Taylor* (e), and *Murray v. Addenbrook* (g) had no application, as they all depended upon the very special frame and wording of the particular wills from which the Court had collected in those cases that the death without issue there spoken of was to be intended a death without such issue as would have taken by force of the prior limitations.

Here the gift over, if *Caroline* died without lawful issue, was to the testator's nephews and nieces living at
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(a) 1 Bro. C. C. 187.

(b) 17 Ves. 479.


(c) 1 P. Wms. 600.

(d) Willes, 348.

(e) Page 416. *infra*.

(g) 4 Russ. 407.

the time — living, that is, at the time of the failure of her lawful issue. That limitation was certainly too remote; for, as it was descriptive of a class in terms large enough to include all after-born children of the testator's brothers and sisters, it would, if it were allowed to operate, suspend the time of vesting beyond the period of lives in being, and, possibly, also beyond a period of twenty-one years afterwards; *Jee v. Audley* (a), *Leake v. Robinson* (b), *Bull v. Pritchard* (c), *Palmer v. Holford* (d). The illegitimacy of *Caroline Harding* would not affect the question, because, in the settlement which the testator directed to be made in the event of her marriage, he anxiously provided for her issue.

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Mr. Spence appeared for the Defendants Mr. and Mrs. Pulman.

Mr. Twiss, in reply.

The LORD CHANCELLOR (after stating the material clauses of the will) proceeded as follows: —

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The question here is, that which so frequently arises in cases touching executory devises of this description, whether the limitation over “to my nephews and nieces” is a limitation upon a general failure of issue of the daughter, or whether it is a limitation over upon a failure of issue at a given time, namely, at her decease; that is to say, whether the words are to be read, “if my daughter die without issue” generally, or are to be read, “if she die without issue living at the time of her death.” In the one case, had the subject been realty, an estate

(a) 1 Cor. 324.

(c) 1 Russ. 213.

(b) 2 Mer. 363.

(d) 4 Russ. 403.

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estate tail would have been created; consequently there would be in the immediate taker, it being personalty, an absolute interest, discharged of all the limitations over; in the other case there would have been no estate tail in the first taker had it been realty; and it being personalty, there would be an estate given to the first taker absolute in point of form, but subject to a good limitation over, operating by way of executory devise. The Vice-Chancellor held that the words were to be taken without qualification, and as importing a general failure of issue, not issue failing at a given time.

His Honor is said to have mainly relied upon two decisions in *Freeman* (a), where the general case occurs in its most abstract and naked form. These have now become leading authorities upon this difficult and somewhat various branch of the law; they have been uniformly followed, and they may be said to have settled the law, where there is no restrictive circumstance to create an exception.

The question here, however, is not whether, if this had stood alone (as in *Burford v. Lee*) "to my daughter *Caroline*, and in case of her death without issue," then over, that would mean a general failure of issue, or a failure by leaving no issue living at the time of her death; but whether there is nothing in this particular will which, taking the whole instrument together (but more especially taking this particular portion of it together), makes the case an exception from the general rule, a rule as well settled, both as to real and personal estate, as any thing known in the law.

It may be laid down as an undeniable proposition, the result to be collected from the very numerous cases

on


(a) *Burford v. Lee*, *Freem.* 210., and *Anon. ib.* 297.

the subject, that, in regard to these executory devises, a distinction has been taken between real and personal estate; and that though, where the words occur without qualification, the leaning would, in construing the failure of real estate, be towards a general failure of issue in favour of the heir-at-law, there is no such leaning where the property is merely personal; the result having in the latter case been rather astute and anxious to catch at any circumstances appearing on the face of the instrument which may restrict the failure of issue to the death of the first taker. The question then arises to be, whether, — regard being had to the principle recognised in those cases where a limited instead of a general failure of issue has been held to be the true construction, and regard being also had to the frame of the present bequest, or perhaps I might say of the whole instrument together, — whether this case comes within the scope of these authorities, or the principles to be gathered from them. My original impression was, that none of the cases came up to the present, and that if I were to lean for the restricted instead of the general and indefinite sense, thereby giving effect to the bequest over, I should be going a good deal further than they warranted; and the result of farther consideration is confirmatory of my first opinion.

It is to be observed in the outset, that although the cases have been thrown out at different times in *West-
er Hall* touching the correctness of Lord *Maccles-*
field's distinction (a) between real and personal estate,
the Lordship holding that the words "without leaving
issue" were to be taken as referring to a general failure
of realty, and in the restricted sense, as
applying to the leaving issue at the time of the death,
in

(a) In *Forth v. Chapman*, 1 P. Wms. 663.

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in a bequest of personalty ; and although those doubts have been sanctioned by judges no less eminent than Lord *Thurlow* and Lord *Kenyon*, the great authority of Lord *Eldon*, in *Crooke v. De Vandes*, tends to restore the weight due to the authority of *Forth v. Chapman* upon this point. In *Crooke v. De Vandes* (a) Lord *Eldon* says : “ When I read the case of *Porter v. Bradley* (b), speaking with all due deference to the learned judge who expressed that *dictum*, it appeared to me that it went to shake settled rules to their very foundation. I had heard the case of *Forth v. Chapman* cited for years, and repeatedly by Lord *Kenyon* himself, as not to be shaken. I never knew it shaken ; and if *Porter v. Bradley* has not been since disturbed in the Court of King’s Bench, upon the principles expressed by Lord *Alvanley* in *Campbell v. Campbell* against shaking settled rules, I will not add to the authority of that *dictum*.” Lord *Kenyon*’s observation, though merely *obiter dictum*, broke in considerably upon the distinction with respect to the effect of the word “leaving” as applied to real and personal property ; and there is no doubt, also, that the judgment in *Roe v. Jeffery* (c), which was a question touching a devise of real estate, and in which that *dictum* was much relied upon, tended still more to shake the distinction laid down by Lord *Macclesfield* in *Forth v. Chapman* with respect to the different operation of the word “leaving” as applied to cases of real and of personal property.

To the first class of cases in which the general words “dying without issue” have been taken in a restricted sense belongs the case of *Nichols v. Hooper* (d), where the gift was to *B.* for life, remainder to *C.* and his heirs ;
 but


(a) 9 *Ves.* 197.

(b) 3 *T. R.* 143.

(c) 7 *T. R.* 589.

(d) 1 *P. Wms.* 198.

but if *C.* should die without issue of his body, then the testator gave 100/. a piece to his two nieces, to be paid within six months after the death of the survivor of *B.* and *C.* The language of this bequest clearly indicates the plainest intention that there should be a limitation to the period when the gift over was to take effect, inasmuch as something was to be done upon that failure — a sum of money was to be paid within six months after the decease of the first takers; a circumstance distinctly shewing that the contemplation of the parties was confined to a failure of issue at the death of the first and second takers, and excluding the operation of the general rule.

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Another class of cases is similar to *Target v. Gwent* (a). That was a bequest of a term to *A.* for life, and no longer; and after his decease, to such of his issue as he should by will appoint; and in case he should die without issue, remainder over. Now, the circumstance that this bequest was to go in remainder to such issue as he should by his will appoint, was a strong indication that the legatee over was to be some person of whom *A.* was cognizant, some person, therefore, *in esse* during his lifetime, and consequently limiting the generality of the words.

Next come cases of the same description as *Hughes v. Sayer* (b), and *Nicholls v. Skinner* (c), which are substantially the same, where the gift was, “if *A.* or *B.* die without issue, then to the survivor;” and where the circumstance that the legatee over was to be one of the individuals for whose lives the whole had been previously limited, was considered restrictive and inconsistent with the notion of a perpetuity.

To

(a) 1 *P. Wms.* 432.

(c) *Prec. Ch.* 528.

(b) 1 *P. Wms.* 534.

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To the fourth class, which, in one of those points, resembles the others, belongs *Pinbury v. Elkin* (a), which was a bequest to A., and if she die without issue, then after her decease 80*l.* to remain to the testator's brother. The same principle was by implication recognised in *Paine v. Stratton* (b), where, if the interlined words, "after her death," had not been afterwards scored out, and ultimately determined to form no part of the will, they would, it seems, have been held sufficient, on the authority of *Pinbury v. Elkin*, to restrict the generality of the expression. The *dictum* of Lord Hardwicke, in *Theobridge v. Kilburne* (c), that the words "immediately from and after the decease," were too precarious a foundation for the restricted construction, appears certainly at variance with the decision in *Pinbury v. Elkin*, but the observation was entirely extra-judicial, and is therefore less deserving of attention.

The last class of cases referred to is the most important and most general; those, I mean, where, from the terms of the devise with reference either to the subject matter of the gift, or to the extent of interest given to the devisee or legatee over, a presumption is necessarily raised, inconsistent with the construction of an indefinite failure. If, for instance, the estate which the testator is dealing with be an estate held *per autre vie*, it is impossible that the gift over, after a general failure of issue, can tend to a perpetuity. If an estate held for the life of A. and B. be devised to C. for his life, and if he shall die without issue in the most general form, then over to D., it is perfectly clear that the limitation over must vest in D., according to the strict rule of law, within the compass of lives in being.

The

(a) 1 P. Wms. 563.

(c) 2 Ves. sen. 233.

(b) 2 Atk. 647. 3 Bro. P.C. 99. Toml. ed.

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The other and more usual case is, where a restriction is raised from the nature of the estate given by the limitation over; as where, for example, the interest given over is an estate for life or lives, that circumstance imports such a restriction, and raises a presumption in favour of the words meaning issue living at the time of the death, which thus prevents the perpetuity. I state this proposition with diffidence, because it appears to be somewhat at variance with the doctrine laid down by Sir W. Grant in *Barlow v. Salter* (a), although the case with which he was there dealing was that of a gift to survivors absolutely, and not merely of life estates, and in that respect differed from the class I am now considering. In *Barlow v. Salter* Sir W. Grant says, "If there is any case which has ascribed to the circumstance of a devise over for life the effect here contended for [the effect, that is, of confining the failure of issue to the death of the prior devisee], I must beg leave to doubt the soundness of the decision. The case of *Roe on the demise of Steers v. Jeffery* (b), certainly gives no countenance to that doctrine, as the devise over was only of life estates; and on that ground Lord Kenyon compared it to *Pells v. Brown*." (c)

The cases at law, however, leave no doubt that the character of the devise over, as being an estate for life only, has been imported into the consideration of the question of construction, and that it furnishes a fifth head of exception to the general rule. *Roe v. Jeffery*, which was a case argued with his wonted ability by Sir Samuel Romilly, was clearly decided upon special grounds. That was a devise to A. for life, with remainder to B. and his heirs; but in case B. should die, and leave

no

(a) 17 Ves. 479.

(b) 7 T. R. 589.

(c) Cro. Jac. 590.

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no issue, then the premises were to be and return unto *E.*, *M.*, and *S.*, or the survivor or survivors of them, equally to be divided. Upon this, three things may be observed: first, the word “leave” occurs; — if he die and *leave* no issue — an expression which, had the subject been personal estate, would, upon the authority of *Forth v. Chapman*, have at once decided the question; and which, notwithstanding the well-settled distinction between real and personal property in that respect, was much relied upon by Lord *Kenyon* in his judgment. The next circumstance distinguishing *Roe v. Jeffery* is survivorship, which brings it within the class of cases already adverted to, such as *Hughes v. Sayer*, and *Nicholls v. Skinner*. A third circumstance also exists, upon which the courts mainly rely, — the circumstance of the devisees over taking mere life estates; for in the executory devise to *E.*, *M.*, and *S.*, there are no words of inheritance. Upon these grounds, separately and together, the Court held the limitation over in *Roe v. Jeffery* to be a good executory devise.

Keily v. Fowler (a), decided in the House of Lords, is a case by itself, and so very peculiar in its character, that it cannot form a rule, or be ranged under any of the classes referred to. It appears to have proceeded entirely upon its own circumstances, and cannot, therefore, be considered as breaking in upon the general rule. The Court there, as it appears from the report, as well as from the language of Lord *Thurlow* and Lord C. J. *Wilmot*, laid hold of all the circumstances, but most particularly the circumstance of its being a personal trust, the duties imposed on the executors strongly implying a *delectus personarum*: the very peculiar form of the direction that the property should return back

to

(a) 3 Bro. P. C. 299. Toml. ed. *Wilmot's* notes, 298.

to the executors in order to be divided, and the nature of the chattels to be given to the daughter, viz. twenty cows and one horse, in the event of the limitation over taking effect, were also material features in the case; and from all these circumstances and expressions taken together, the Court considered itself justified in holding, that the failure of issue must be intended to be confined to the period of the life of the first taker. This is the mode in which Mr. *Fearne* understood and explained that decision; although it seems not to have been satisfactory to Lord *Thurlow*, who, in afterwards commenting upon the case in *Bigge v. Bensley* (a), is reported to have said, "It would be better sense to say, that in *Keily v. Fowler* there was no rule of construction than Mr. *Fearne's* rule." Another version of Lord *Thurlow's* dictum is, however, extant, at which Mr. *Fearne* had no occasion to take offence, and which represents his lordship as having only said, "There is no *other* rule than Mr. *Fearne's*." But Mr. *Fearne* appears not to have seen the latter version, and the fancied disapprobation of Lord *Thurlow* drew from him, in the last edition of his treatise, an additional passage, in which he vindicates the reasoning he had previously adopted.

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With respect to *Blackborn v. Edgley* (b), I may observe that it seems to have little or no bearing on the case before the Court; the question in discussion there relating to a proposition now thoroughly established, that it makes no difference whatever whether the words give an express estate tail, or an estate tail by implication.

Upon a review of all the cases, I am satisfied that no authority can be found for going beyond the devise
 itself,

(a) 1 Bro. C. C. 187.

(b) 1 P. Wms. 600.

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itself, taking all its parts together. I will not be stopped by a colon or a period : if the next succeeding sentence is manifestly a substantial part of the bequest, I shall treat it like an act of parliament, which has no stops, and read it as a part of the bequest ; but I will not go into another branch of the will for the purpose of shewing a general intention. Of what use is it to look at intention in these cases? Did any man ever make a will in which he wished that an executory devise should fail? The very making of this will shews the contrary. In *Burford v. Lee* (a) the testator no doubt intended, and was desirous, that the estate should upon certain events go to the devisee over. His intention that the ulterior limitation should take effect was just as plain as if he had used the words “ living at the time of the first taker’s death : ” but a limitation after the failure of issue generally is an intent not sanctioned by the law : it would tend, were it effectuated, to create a perpetuity by suspending the vesting of the ulterior estate for a period exceeding lives in being and twenty-one years further ; and for that reason, and not with reference to intention, it is not permitted.


I have stated that the Court is bound to look to the particular devise, and not to travel out of it in order to find circumstances for restricting the generality of the terms in which the executory gift over is limited. The testator has here said that in case of *Caroline’s* death without lawful issue, he *then* wills the money to be divided so and so, and reliance is placed upon the word “ then.” But in *Beauclerk v. Dormer* (b) it is expressly laid down by Lord *Hardwicke* that though the word “ then ” in the grammatical sense is an adverb of time, yet in limitations of estates and framing contingencies it

(a) 2 *Frem.* 210.

(b) 2 *Atk.* 308.

it is a word of reference, and relates to the determination of the first limitation in the estate, when the contingency arises. Used in this way, "then" is a particle of inference connecting the consequence with the premises, and meaning "in that event" or "if that happens." It is therefore a word of reasoning rather than of time, and it is so to be understood here. In *Jee v. Audley*(a), where some stress was laid upon the word "then," the expression was applied in a very different way; for the property was directed to be equally divided among the children of C. "then living;" and this accordingly brings me to the latter clause here, in which the fund in the specified event is directed to be divided between the testator's nephews and nieces who may be living "at the time." Now I do not think the expression "at the time" carries the case further than the word "then," understanding that word in its grammatical sense as referring to and marking time. The question still remains behind, at what time? Is it "at the time of the death (in whatever event it happens) of the first taker?" or is it not rather "at the time of the death of the first taker without issue?" I say that upon the authorities it is to be taken to be "at the time of the death without issue." "At the time" is of itself an elliptical phrase which recognises something to be understood; and where there is an obvious ellipsis, the *sub-intellectum* must be collected from what occurs before: here the antecedent is "dying without issue." If that is to be construed "dying without issue at the time of the death," the expression "at the time" in the subsequent clause may mean "living at the time of the death:" but it is unnecessary to import these latter words, the meaning of the first limitation having been already ascertained without supplying them. If, on the other hand, the

dying

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(a) 1 Cox, 324.

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dying without issue is to be a dying without issue generally, then, by a parity of reasoning, the words "at the time" in the subsequent clause must refer to the words "dying without issue" generally, and the question is immediately determined the other way. It is, therefore, impossible, according to any fair principle of construction, to carry the case further upon the expression "at the time" than upon the word "then" used as an adverb of time. The question then resolves itself into this — ought that expression to be construed as referring to the time of the decease, or to the time of the failure of issue? and that again brings us round to the point from which the inquiry originally set out, that is to say, to the construction to be put on the clause of gift itself. Indeed it is only by a *petitio principii*, or something very like it, that the least shadow of argument can be founded on the expression "living at the time," and that only by importing it into the clause from a subsequent part of the will.

Next, if *Caroline* marries — I pass over some intermediate gifts, which are immaterial — "if she marries, it must be with their consent, and the property to be solely settled upon herself and children, and in no way changed or alienated." Assuming this to be equivalent to a direction that the property shall be settled for her separate use, and afterwards for her children, I do not find that it alters the case. The testator is contemplating and providing for the event of his daughter's marriage. In that event he requires the fund, to be settled upon her and the children of the marriage, to be for her sole use, so as to exclude the debts, engagements, and control of the husband during coverture; and subject to her interest, in case she comes under marital authority, it is to be settled upon the children. But there still remains one case unprovided for, as to which the

question would be, — what was to take place, not in event of her marriage and having no issue, (for the testator would provide for that,) but in the event of not marrying? and that brings us round to the point, and leaves the case exactly where it stood.

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consider next the effect of the bequests to other persons: for instance, “to *Charlotte Ann Harding*, my daughter of my late brother *Francis*, the sum of £1000, but in case of her death without issue this sum to revert back, and to be divided betwixt my sons and nieces who then may be living.” The provisions here by no means come up to those which were found in *Keily v. Fowler (a)*, where the subject of the gift was to return back to those identical persons, the executors, and was to be actually provided, and was clearly contemplating and expressing a desire that the sum should revert to them personally. That, however, is not the consideration now; nor am I at liberty to import it into the present question; for if the construction with respect to the limitation over, in the event of *Charlotte's* death without issue, had been clearly the way — if that had been a good limitation to the sons and nieces, it would have been so in consequence of the difference in the words used. If a man uses the same form of expression in one part of his will, and a different form in another, the ordinary rules of construction would incline me to believe that he had a different meaning in the two cases. But, be that as it may, it is a consideration into which I cannot enter; it has nothing to do with the bequest which I am called upon to construe.

I have

(a) 3 Bro. P. C. 299. Toml. ed.

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I have read through the rest of this will, but it is quite clear that nothing turns upon any other part of it; and my opinion upon the whole is, that the gift over to the nephews and nieces is void as an executory bequest, and that the absolute interest in the fund vests in *Caroline*, the first taker.

It is said she was a natural daughter; but I cannot perceive how that circumstance should at all affect the question of construction, upon which, as I have already observed, considerations of probable intention have no bearing whatever. Of course the testator never wished or intended that the crown should take; it is clear he would have wished to prevent the crown from taking in the event of *Caroline* dying, and for that purpose, to enable her to dispose by will of the personal estate; and she has accordingly made a will which defeats the rights of the crown. Nevertheless, whatever might have been his acts, and whatever his intent, if that circumstance had been present to his mind, it is clear it cannot now be taken into account, for it is a fact which is entirely independent of the will.

Mere presumption of intention, drawn from extrinsic circumstances, unless some expression of the intention be found in the instrument itself, is of no value; and, beyond mere presumption, there is nothing here which can control the legal effect of the clause constituting the substance of a gift to *Caroline*. Whatever expressions may occur in other parts of the will, inconsistent with and independent of that particular gift, I strongly incline to think that the Court is not entitled to pay regard to them: but I wish it to be understood that, even if I were at liberty to range over the whole instrument, no such indications of intention are to be found. Nor have I been able to discover

cover any cases, either at law or in equity, in which the Court has gone out of the devise itself. If, however, any such cases exist, they would not have the slightest bearing upon the decision of this particular question, though they might break in upon the general rule to be gathered from the authorities, that in giving a construction upon the bequest the Court is to confine itself to the words which constitute and contain the body of the gift.

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For these reasons the decision of his Honor must be affirmed ; but it is not a case for costs.

This case was afterwards carried by appeal to the House of Lords, under the name of *Candy v. Campbell* ; where the judgment of the Lord Chancellor was affirmed on the 19th day of *June* 1834.

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June 23.

July 5. 8. 19.

MALCOLM v. TAYLOR.

L. C.
Dec. 20, 21.
1832.

March 10.

Where real and personal estates are given together for life, and so limited over that a child of the tenant for life would take a vested interest in the real estate at its birth, and in the personal

MARTHA TAYLOR, spinster, being seised in fee of an interest in a moiety of the *Lysons Plantation*, in the island of *Jamaica*, with the slaves and stock thereupon, and being also possessed of a large personal estate, by her will, which was duly executed and attested, after giving divers specific legacies to her mother Dame *Elizabeth Goodin Taylor*, her sisters *Anna Susanna Watson Taylor* and *Maria Taylor*, and to other persons, gave and bequeathed as follows:—“Also I give and bequeath the sum of 5000*l.* sterling to my mother, the said *Elizabeth Goodin Taylor*, and a like sum of

estate at twenty-one, being a son, or at twenty-one or marriage, being a daughter, and there is a gift over in the event of the tenant for life dying without issue, it is to be intended a dying without such issue as would take by force of the prior limitations.

A testatrix, after bequeathing divers annuities and legacies, and, amongst others, a sum of stock to *M. M.* to vest at twenty-one or marriage, devised and bequeathed a *West India* plantation, and all the residue of her money in the funds, after payment of the annuities and legacies therein-before bequeathed, and also her plate, books, and certain portraits, to *E. G. T.* and *M. T.* for their lives equally, and after the death of either, the whole to the survivor for life, and after the decease of the survivor, then unto such children of *M. T.* as she should by deed or will appoint; and in default of appointment, then the plantation and the residue of the money in the funds to be equally divided among the said children and their heirs; and if but one child, the whole to such child and his or her heirs, the funded property to be an interest vested in them, being sons, at twenty-one, and being daughters, at twenty-one or marriage; but in case *M. T.* should die without issue of her body lawfully begotten, the testatrix devised the plantation equally among all the children of *A. W.* and their heirs; and in case *M. T.* should die without issue as aforesaid, she then bequeathed her said residue of her money in the funds, and all her said plate, books, and portraits unto *J. M.* for life, and after his decease to his eldest son for ever: but, in case *J. M.* should die under age and without issue, then the said residue of her money in the funds, plate, books, and portraits unto *M. M.* absolutely. All the rest and residue of her estate and effects the testatrix gave and bequeathed unto *E. G. T.* and *M. T.* absolutely. *M. T.* having survived *E. G. T.* and died without having been married, it was held,

That *J. M.* took a life interest in the funded property;

That *J. M.* took no interest in the plate, books, and portraits, the limitation over of those articles being too remote;

That the stock legacy to *M. M.*, which had lapsed by her death under age and unmarried, passed under the residuary bequest of the funded property, for the benefit of *J. M.*, and did not sink into the general residue.

of 5000*l.* to my sister, the said *Maria Taylor* ; and I give and bequeath the sum of 500*l.* to the said *Anna Susanna Watson Taylor*, to be laid out in some remembrance of me. I also give and bequeath the sum of 1000*l.* to *Simon Watson Taylor*, eldest son of my said sister *Anna Susanna Watson Taylor*, to purchase a piece of plate in remembrance of his late uncle and godfather, my dear brother. I also give the sum of 50*l.* a piece to my uncle *Neil Malcolm* and to his wife *Mary Ann Malcolm*, to be laid out in remembrance of me, as a trifling mark of my esteem ; and to each of their four children, namely, *Neil Malcolm*, *Elizabeth Mary Malcolm*, *Mary Malcolm*, and *David Orme Cuthbert Malcolm*, I give the sum of 20*l.* to purchase some small remembrance of me : and I give and bequeath to their third son, and my brother's godson, *John Malcolm*, the sum of 3000*l.* for his own absolute use and benefit, to be paid to and be an interest vested in him on his attaining his age of twenty-one years, and to be accumulated for him in the meantime at compound interest. I also give and bequeath to *Mary Ann Martha Malcolm*, third daughter of the said *Neil* and *Mary Malcolm*, the sum of 2000*l.* for her own use and benefit, to be paid to and be an interest vested in her on her attaining the age of twenty-one years or being married, whichever shall first happen, and in the meantime to be accumulated for her at compound interest." The testatrix then gave a number of pecuniary legacies to some of her more distant relatives and connections, and to servants, and continued thus : — " And I give, devise, and bequeath my share or portion, right and interest of and in the moiety of *Lysons Plantation* or estate in the island of *Jamaica*, and the slaves, cattle, and stock thereupon and thereunto belonging, and also all the residue and remainder of my money in the funds, after payment of the annuities and legacies herein-before bequeathed, and also all my

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my plate, books, and the portraits of my father, brother, and uncle *Simon Taylor*, unto and to the use of the said *E. G. Taylor* and *Maria Taylor*, and their respective assigns for the terms of their natural lives, share and share alike, and after the death of either of them then unto the survivor of them and her assigns for her life: and I will and direct that the estate, share, and proportion of the said *Maria Taylor* shall be for her own sole use and benefit, separate and apart from any husband she may hereafter marry; and her receipts alone to be sufficient discharges for the produce, profits, interest, or dividends thereof; and after the decease of the survivor of them, the said *E. G. Taylor* and *Maria Taylor*, unto such of the children of the said *Maria Taylor* as she shall by any deed in her lifetime, or by her last will and testament duly executed and attested in the presence of three or more witnesses, direct or appoint; and in default of such direction or appointment, and as far as the same shall not extend, then I will and direct that my said share or portion of the moiety of *Lysons Estate* and the said residue of my money in the funds shall be equally divided between and among the said children, share and share alike, their heirs and assigns, and if but one such child, then the whole to such one child, his or her heirs and assigns; the funded property to be an interest vested in and paid to them or the survivors or survivor, being sons, at twenty-one, and being daughters, at twenty-one or marriage: and in case the said *Maria Taylor* shall die without issue of her body lawfully begotten, then I give, devise, and bequeath, after the decease of the survivor of them, the said *E. G. Taylor* and *Maria Taylor*, my said portion of the moiety of the *Lysons Estate* unto and among all and every the children of the said *Anna Susanna Watson Taylor* and to their heirs and assigns, equally to be divided between them, share and share alike;

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alike; and in case the said *Maria Taylor* shall die without issue as aforesaid, I then give and bequeath (after the death of the said *E. G. Taylor* and *Maria Taylor*) the said residue of my money in the funds, and all my said plate, books, and portraits of my father, brother, and uncle, unto the said *John Malcolm* and his assigns for his life; and after his decease, I give and bequeath the same to his eldest son for ever. But in case the said *John Malcolm* shall die under age and without issue, I then give and bequeath the said residue of my said money in the funds, plate, books, and portraits unto the said *Mary Ann Martha Malcolm* absolutely: but the said plate, books, and portraits shall after her decease go to her eldest and other sons or children in succession, so far as the rules of law and equity will permit, by way or in nature of heirlooms; yet nevertheless so that the same shall not vest absolutely in any person or persons, until he, she, or they respectively shall attain or have attained the age of twenty-one years, or dying under that age, shall leave issue of his, her, or their body or respective bodies. And all the rest, residue, and remainder of my estate and effects, real, personal, and mixed, I give, devise, and bequeath unto the said *Elizabeth Goodin Taylor* and *Maria Taylor*, their heirs, executors, administrators, and assigns, equally to be divided between them, share and share alike: and I nominate, constitute, and appoint the said *E. G. Taylor* and *Maria Taylor* joint executrixes of this my last will and testament."

The testatrix died in the year 1817. *Maria Taylor* survived *Elizabeth Goodin Taylor*, and died without having ever been married. *Mary Ann Martha Malcolm* died in the year 1828, under age, and unmarried. The present bill was filed by *John Malcolm*, who had come of age, but had not married, against *Anna Susanna Watson*

CASES IN CHANCERY.

Watson Taylor, and her husband, *Mr. Watson Taylor*, representing the estates of the testatrix, and of *Elizabeth Goodin Taylor* and *Martha Taylor*, and against all other parties claiming interests under the will.

The main question in the cause was, whether, in the events which had happened, the Plaintiff was entitled to the residue of the testatrix's money in the funds, and to the plate, books and portraits; and if he was, whether he took an absolute interest, or a life estate only, in these two several descriptions of property. For the Plaintiff it was argued, that the word issue was to be understood in a restricted sense, as meaning children; or that it was to be intended as issue living at the death of *Maria Taylor*.

The Defendant, *Mrs. Watson Taylor*, claimed to be entitled to the property, upon the ground, that by the dying without issue, the testatrix contemplated a general failure of issue of *Maria Taylor*, and that the limitation over to the Plaintiff in that event was too remote. The same questions were also raised in a cross-suit of *Taylor v. Malcolm*, which was brought on for hearing together with the original suit.

The case was very fully argued by *Mr. Bickersteth*, *Mr. Miller*, and *Mr. Hodgkin*, for the Plaintiff; and by *Mr. Pemberton*, *Mr. Spence*, *Mr. Preston*, *Mr. J. B. Parry*, and *Mr. W. Russell*, for the different Defendants.

July 5.

The MASTER of the ROLLS.

As applied to the real estate, the expression "dying without issue" is to be construed a dying without having had issue, because, as a child of *Maria Taylor* would take a vested interest upon its birth, the limitation

tion over can have no other object than to provide for the failure of children.

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With respect to the funded property, a child of *Maria Taylor* would not take a vested interest at its birth; nor until, being a son, it attained twenty-one, or, being a daughter, it attained twenty-one or married; and the expression "dying without issue" cannot, as to this property, be construed a dying without having had issue, because, although *Maria Taylor* had a child born, the limitation over might still take effect by the death of such child before it attained twenty-one, being a son, or, being a daughter, before it attained twenty-one, or married. Neither can the expression be construed a dying without issue living at the death, because, although a child of *Maria Taylor* were living at her death, the limitation over might yet take effect by the death of the child before it acquired a vested interest. The expression "dying without issue," as applied to the funded property, must, therefore, either mean a dying without such issue as would take by force of the prior limitation, or a general failure of issue. It is a reasonable intendment, that a subsequent limitation is meant to take effect upon failure of the prior gift, and is a substitution in that event. This is the plain intention of the testatrix with respect to the real estate; and it is to be supposed, where real and personal estate are given together, that the testatrix had the same intention with respect to the funded property and the real estate. The objection to this construction is, that if a son married and died under twenty-one, leaving a child, such child would take nothing; and I agree that it is probable, that if the possibility of such an event had occurred to the testatrix she would have provided for it; and the inquiry then is, whether the testatrix used the words "dying without issue" in order to provide for that

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that event, or whether, that event not being in her contemplation, she could not mean to provide for it.

It is reasonable to infer, that if she had contemplated that event, she would have provided for it in express terms by vesting the property in sons on their marriage, as she has done in the case of daughters. It appears to me, that the true answer to the objection is, that it not being usual for sons to marry under twenty-one, the testatrix did not contemplate, and her will has not provided for that event; but it being usual for daughters to marry under twenty-one, the testatrix therefore contemplated and has provided for that event. Upon the whole, therefore, as to the funded property, I am of opinion that I shall best advance the expressed intention of the testatrix by holding the limitation over to mean, not a general failure of issue, but a failure of the children for whom the prior gift was intended.

With respect to the plate, books, and portraits, it is manifestly a gift to *Maria Taylor* for life, with a remainder over on her dying without issue; and there is no intermediate gift. This is either too remote as meaning an indefinite failure of issue, or is an estate tail by implication in *Maria Taylor*; and in either case the plate, books, &c. belong to *Mrs. Watson Taylor*.

July 8. 19.

The cause having stood over to a subsequent day, in order to be further discussed upon other points, a subordinate question then raised and argued was, whether the stock legacy of 2000*l.*, which had lapsed by the death of *Mary Ann Martha Malcolm* under age and unmarried, passed to the Plaintiff under the residuary bequest of the testatrix's money in the funds, or formed part of the general residue of her property, belonging therefore to her residuary legatees.

His



His Honor said that in his opinion the stock in question was given to *Mary Ann Martha Malcolm* as a charge upon the residue of the testatrix's money in the funds; and that being the case, inasmuch as the legacy had lapsed by the death of the legatee under age and unmarried, it must be held to pass under the gift of that residue to the Plaintiff.

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By the decree it was, among other things, declared, that according to the true construction of the will of the testatrix, the Plaintiff, *John Malcolm*, upon the death of *Maria Taylor*, became entitled for his life to all the residue and remainder of the testatrix's money in the funds after payment of the legacies and annuities thereby bequeathed; and that such legacies and annuities were exclusively charged on the money in the funds in exoneration of the testatrix's personal estate; and that the plate, books, and portraits therein mentioned, became and were the absolute property of the said *Maria Taylor*, and that the same now belonged to the Defendants, her legal personal representatives; and that by the death of *Mary Ann Martha Malcolm* under age and without having been married, the legacy of £2000., bequeathed to her by the said will, lapsed for the benefit of the legatee of the residue of the said testatrix's money in the funds, &c.

The Plaintiff and the Defendants presented cross petitions of appeal against his Honor's decree. Dec. 20, 21.

Sir *E. Sugden*, Mr. *Knight*, Mr. *Miller*, and Mr. *Hodgkin*, for the Plaintiff *John Malcolm*.

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The main question is, whether in the event that has happened of *Maria Taylor* dying after her mother, and without having had children, the bequest of the funded property, and of the plate, books, and portraits to *John Malcolm* is effectual. With reference to the money in the funds, that question must depend on the answer to another, whether the words introducing the gift over are such as to render the ulterior limitation over too remote. The testatrix gives her *West India* estate and the residue of her money in the funds to the children of *Maria Taylor*, as she shall appoint; children and they alone being the objects of her bounty. She next provides for the case of there being no appointment, upon which, as to the land, no doubt can arise; for the only term used is children, and under the language of the clause, children, had they come into *esse*, would have taken a fee-simple at the moment of their birth. With respect to the stock, the provision (though for the purpose of effecting precisely the same intention) was necessarily different, in consequence of the different nature of the subject-matter. The direction there is, that the property shall not become vested in the children, unless, if sons, they attain twenty-one, or if daughters, they attain that age or marry. When the testatrix directs, that in case *Maria Taylor* shall die without issue of her body lawfully begotten the *West India* plantation shall go among the children of *Mrs. Watson Taylor*, she can have but one intelligible meaning, viz. that in case *Maria Taylor* dies without the issue provided for by the preceding limitation, in other words, without having had children (in whom, under the words of the prior devise, a fee-simple in the plantation would have vested at their birth), then, and then only, the subsequent and alternative limitation to the family of *Mrs. Watson Taylor* shall have effect. The testatrix never looked beyond the first line of devisees. If that line did not come into *esse*,

esse, she nominated another to take in their stead; but as the two were not to take successively, she has used no expression importing devolution or descent. The children of *Maria Taylor*, if they took at all, were to take absolutely; if their interest never arose, the property was to go over, not by way of succession, but substitution, to other parties. To the clause which immediately follows respecting the funded property, the same rule of interpretation must necessarily be applied: —“ and in case *Maria Taylor* shall die without issue as aforesaid, I then give and bequeath, after the death of *E. G. Taylor* and *Maria Taylor* (taking it for granted that the event would happen, if at all, upon the death of those two ladies), the said residue of my money in the funds, &c. unto the said *John Malcolm*.” Plainly the words “ without issue as aforesaid ” can only refer (as in the case of the real estate) to such issue as would, under the prior or aforesaid limitations, take the money in the funds, and the death spoken of must be a death without children attaining twenty-one, if sons, or attaining twenty-one or being married, if daughters.

The intention, as to the real estate and the stock, must have been exactly the same. The two were to go together to the same class of persons; and accordingly the effect, though not the language, of the gift over is identical in the two cases; for after a limitation, which would vest the plantation and the money in the funds in all the children absolutely, the former at their birth, and the latter at their majority or marriage, the property in both is given over, in case *Maria Taylor* shall die without issue capable of taking those respective descriptions of property. Such as applied to the money in the funds, is the natural and only rational construction of the words “ issue as aforesaid ” that is, issue before designated as the objects to take an absolute and vested

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interest in the subject-matter of the bequest. The words "as aforesaid" are in this view most significant; for, literally construed, they impose an express restriction on the generality of the death without issue, on which the ulterior limitation depends, of necessity confining it to the failure of that class of issue to whom, in the prior clause, the money in the funds had been bequeathed. In the devise over of the real estate those words are wanting, because, the first devise being to children in fee, they are unnecessary; whereas, in the bequest of the money in the funds, which was only to vest in children on a specified event, they were indispensable, and were purposely introduced in order to keep the two species of property together and in the same course of devolution.

Even if the words "as aforesaid" had been omitted, the death of *Maria Taylor* without issue must, consistently with the authorities, have been construed a death without such issue. By reading the words literally, all the subsequent limitations would be destroyed: a whole class of legatees for whom the testatrix meant to provide would be disappointed; while another class, for whom certainly she had no such intention, namely, children who died under twenty-one and unmarried, would be let in. The expression "death without issue," occurring as it does here, would, as applied to real estate, unquestionably import a failure of children, and not of issue generally; nor can any case be produced in which, after a gift which would carry a fee simple to children, the devise has been afterwards cut down to an estate tail upon the effect of the word "issue." In *Doe v. Perryn* (a), which was afterwards confirmed in *Rex v. Marquis of Stafford*,

(a) 3 T. R. 484.

'(a), the words "in default of such issue,"
 ing a devise to children and their heirs, were
 be equivalent to "in default of such children;"
 : same principle had been previously recognised
er v. White (b), and in *Goodright v. Dunham. (c)*
 le is equally applicable to limitations of personal
 real estate, where the intention manifestly re-
 and the words, as here, are without violence
 ble of such a construction. *Doe v. Lyde (d)*,
rn v. Edgley (e), *Maddox v. Staines (g)*, *Sheffield*
l Orrery (h), *Wilkinson v. South (i)*, *Salkeld v.*
(k), a case on all fours with the present;
rucht v. Blake (l), *Hockley v. Mawbey (m)*, *Bell*
(n), *Morse v. Lord Ormonde (o)*, *Murray v.*
rook. (p)

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tly the same reasoning applies to the bequest
 books, plate, and portraits. His Honor, indeed,
 red that as to them the gift over to the Plaintiff
 d for remoteness. In deciding upon the bequest
 unded property, he confined the default of issue
ia Taylor, as if it had been in default of *such*
 the ground that that property in the preceding
 the will was given expressly to the children in
 events; but that as the will contained no direct
 the plate, books, &c. it supplied nothing upon
 as to them the default of issue could be re-
 or the purpose of being restricted. This argu-
 ment

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| <i>East</i> , 521. | (k) 1 <i>Eden</i> , 64. |
| <i>Willes</i> , 348. | (l) 2 <i>Ves.</i> jun. 531. |
| <i>Dougl.</i> 264. | (m) 1 <i>Ves.</i> 143. 3 <i>Bro. C. C.</i> |
| <i>T. R.</i> 593. | 82. |
| 1 <i>P. Wms.</i> 600. | (n) 7 <i>Ves.</i> 453. |
| 1 <i>P. Wms.</i> 421. | (o) 5 <i>Mad.</i> 99. 1 <i>Russ.</i> 382. |
| <i>Atk.</i> 282. | (p) 4 <i>Russ.</i> 407. |
| <i>T. R.</i> 555. | |

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ment admits of an easy answer. There is but one set of words introducing the gift over, both of the funded property and of the plate and books, and equally referable to both. How, then, is it possible to deny to the same words the same construction with reference to one and the same subject-matter; for though the descriptions of property are two, they form the subject of but one gift? The distinction first introduced in *Forth v. Chapman* (a), that the words "leaving issue" shall, in a will, have a different operation, according as they apply to real or personal estate, is the exception, not the rule; and, besides, it can have no application to a case where all the property disposed of is strictly of the same nature. The bequest of the funded property enables us to put a restricted construction on the expression "without issue as aforesaid" in the first part of the gift, and justifies, or rather requires, a similar construction in the latter part of it, the words referring to the two being identical, and the intention being obviously the same in both. In all these cases the inquiry is not what is the subject, but what is the intent; and the intent may be as effectually indicated by the gift of a single book as of a library. His Honor supposed that there was no intermediate bequest of the plate and books to the children; but this was a mistake, for the testatrix bequeaths them expressly to such of the children of *Maria Taylor* as she shall appoint. The children were to take them through the medium of their mother's appointment; and a gift of property to a person, as another shall appoint, contains by implication a gift to the object of the power; *Brown v. Higgs*. (b) Besides, the very circumstance that the issue were to take as the tenant for life should appoint, furnishes a ground, such as was held sufficient in *Target v. Gant*,

(a) 1 P. Wms. 663.

(b) 4 Ves. 708. 5 Ves. 495.

Gaunt (a), and *Doe v. Webber* (b), for restricting the generality of the expression to such issue only as could have been objects of the appointment. It may be said that two of the subjects, the plantation and the funded property, are given in express terms; and that the omission of the plate and books indicates a different intention as to them; and the argument might be plausible, were it not manifest from the whole frame of the will, that the intention must have been the same as to all the three species of property, and that it is merely from an accidental slip that the mention of the plate and books is not repeated with the others.

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Assuming that the limitation over is valid both as to the funded property and the plate, the Plaintiff must be held to have taken an absolute interest in both. His Honor thought that as children of *Maria Taylor* were not to take vested interests unless they attained twenty-one or married, the testatrix in the limitations to *John Malcolm* and his family contemplated a similar arrangement; and therefore, notwithstanding the remarkable diversity in its language, he read the latter limitation as if it referred to the same conditions. It is manifest, however, that the gift over, in case *John Malcolm* die under age and without issue, can never take effect. *John Malcolm* is now of age, so that one of the two events which together constituted the condition on which the property was limited over is no longer possible. Certainly the word "or" has in many instances been read "and" where the context seemed to require it, and in order to prevent an estate once vested from being defeated by a mere verbal inaccuracy; *Fairfield v. Morgan*. (c) But here, to support his Honor's construction, the word

"and"

(a) 1 P. Wms. 432.

(c) 2 Bos. & Pul. N. R. 38.

(b) 1 B. & Ald. 713.

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“and” must be read “or,” and that for the purpose of defeating an estate; a proceeding which is neither warranted by authority nor required by the sense: indeed it is in direct opposition to the decision in *Doe v. Cooke* (a), where a bequest over, in case the prior legatee should die an infant unmarried and without issue, was held to depend upon one condition, attended with two qualifications, and to be incapable of taking effect, because, though the legatee died childless, he had attained twenty-one and married. That case, moreover, is a strong authority to shew, that although where an express estate for life only is given to the first taker, with a contingent remainder over which fails, the absolute interest in the legacy will vest as undisposed of in the testator’s personal representatives, yet if the subject-matter of the gift has once been distinctly severed from the general mass of the property, and the testator’s intention appears to have been to dispose of the entire subject away from his executors, the whole will be held to have vested absolutely in the first taker. Even if his Honor’s construction were admitted, however, the ulterior gift to *Mary Ann Martha Malcolm* would remain unaffected; it would then be limited to arise on either of two events; one of them, the death of *John Malcolm* under age, which is within the allowed period, but cannot now happen; the other, which is too remote, being a general failure of his issue, and, of course, causing the gift over which depends on it to be void. The limitation, therefore, is, in substance, to *John Malcolm* for life, with remainder to his eldest son for ever, and if he die without issue, then over. Now these words would in a will of real estate undoubtedly vest an estate tail by implication in *John Malcolm*: *Robinson v. Robinson* (b), *Hay v. Lord Coventry* (c). Nor will the limitation

(a) 7 *East*, 269.(b) 1 *Burr.* 38.(c) 3 *T. R.* 85.

tion to his eldest son make the slightest difference in this respect; *Mellish v. Mellish* (a); and it is a settled rule that wherever the words would create an estate tail in real estate, (whether expressly or by implication is wholly immaterial,) they shall pass an absolute interest in personal estate; *Chandless v. Price* (b), *Wilkinson v. South* (c), *Brouncker v. Bagot*. (d)

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The sum of 2000*l.* directed to be paid out of money in the funds was clearly a specific legacy, which would have failed entirely had no funded property been found at the testatrix's death to answer it. It formed a charge upon that specific fund which, subject to the burthen, was bequeathed to a different legatee; and the rule both in real and personal property is the same, that wherever a charge imposed upon a particular estate by any accident fails of effect, it sinks into the estate charged with it, for the benefit of the person to whom that estate is given; *Wright v. Row* (e), *Kennell v. Abbott* (g), *Baker v. Hall* (h), *Rose v. Rose*. (i)

Mr. *Pepys*, Mr. *Spence*, Mr. *Preston*, Mr. *J. B. Parry*, and Mr. *W. Russell*, for the different Defendants.

If *Maria Taylor* took, as we contend, an absolute interest in the funded property in the first instance, the gift over to *John Malcolm* and his family, being limited after an absolute interest, cannot take effect. Upon this point, the whole of the argument on the other side, as well as the authorities adduced to prove that *John Malcolm*, under the limitation in his favour, took the money

(a) 2 *B. & Cress.* 520.

(b) 3 *Ves.* 99.

(c) 7 *T. R.* 555.

(d) 1 *Mer.* 271.

(e) 1 *Bro. C. C.* 61.

(g) 4 *Ves.* 802.

(h) 12 *Ves.* 497.

(i) 17 *Ves.* 347.

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esse, she nominated another to take in their stead; but as the two were not to take successively, she has used no expression importing devolution or descent. The children of *Maria Taylor*, if they took at all, were to take absolutely; if their interest never arose, the property was to go over, not by way of succession, but substitution, to other parties. To the clause which immediately follows respecting the funded property, the same rule of interpretation must necessarily be applied: —“and in case *Maria Taylor* shall die without issue as aforesaid, I then give and bequeath, after the death of *E. G. Taylor* and *Maria Taylor* (taking it for granted that the event would happen, if at all, upon the death of those two ladies), the said residue of my money in the funds, &c. unto the said *John Malcolm*.” Plainly the words “without issue as aforesaid” can only refer (as in the case of the real estate) to such issue as would, under the prior or aforesaid limitations, take the money in the funds, and the death spoken of must be a death without children attaining twenty-one, if sons, or attaining twenty-one or being married, if daughters.

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The intention, as to the real estate and the stock, must have been exactly the same. The two were to go together to the same class of persons; and accordingly the effect, though not the language, of the gift over is identical in the two cases; for after a limitation, which would vest the plantation and the money in the funds in all the children absolutely, the former at their birth, and the latter at their majority or marriage, the property in both is given over, in case *Maria Taylor* shall die without issue capable of taking those respective descriptions of property. Such as applied to the money in the funds, is the natural and only rational construction of the words “issue as aforesaid” that is, issue before designated as the objects to take an absolute and vested

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esse,

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where specified in terms,—but to the failure of such issue as would, under the different contingencies expressed, take a vested interest in the funds. Read in this way, the words “as aforesaid” impose a very singular qualification on the event upon which the limitation over is to take effect; being considered as a compendious expression, which, when expanded, is equivalent to “such issue as, if sons, shall attain twenty-one, or if daughters, shall attain twenty-one or marry.” Such a mode of interpretation does extreme violence to the language of the instrument, and has not even the merit of accomplishing what was plainly the leading purpose of the will—the providing for the issue of *Maria Taylor* at all events. The meaning of the testatrix unquestionably was, that nothing should go to *John Malcolm* and his family until the issue of *Maria Taylor* had failed; and yet if that lady had died leaving a son, who afterwards died under age leaving issue, that issue would, upon the Plaintiff’s construction, be of necessity excluded, although the words, no less than the intent, are clearly otherwise.

It is not, however, necessary to contend that *Maria Taylor* took a *quasi* estate tail in the funded property; although, according to *Love v. Windham* (a), *Lepine v. Ferard* (b), and the general current of authorities already cited, it certainly would seem that the effect of the remainder limited upon her death without issue was to enlarge by implication the life estate previously bequeathed to her in express terms. It is enough to show that the ulterior limitation to *John Malcolm* is void for remoteness. His Honor has determined it to be so, as far as the plate, books, and pictures are concerned, on the ground that they were limited to him after a general failure

(a) 1 *Leu.* 290.(b) P. 378. *supra*.; and see *Parr v. Swindels*, 4 *Russ.* 283.

failure of issue; and except upon the distinction founded upon *Brown v. Higgs*, which has already been shewn to be inapplicable, it is impossible to suggest a reason why the same principles should not equally extend to the bequest of the money in the funds: *Andree v. Ward.* (a)

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Assuming, for the sake of argument, that the limitation to *John Malcolm* is valid, it is clear that he acquired no more than a life interest under it. The question must here be upon the effect of the subsequent bequest to his eldest son for ever; for the ulterior gift to the sister not being limited on an indefinite failure of issue, but on an event which has failed, viz. the death of *John Malcolm* under twenty-one, the condition upon which alone her estate was to depend can never now arise. Where then is the authority for holding that the words "eldest son for ever" can be construed to mean all the issue male? Even in real estate such a construction has never been supported, unless where it was a necessary inference from the context, that the testator contemplated the further object of disposing of his property to the whole line of issue in succession. In cases of that nature the Court, following *Sondray's case* (b) and *Byfield's case* (c), has sometimes decided that the word "son" may be considered as *nomen collectivum*, synonymous with issue male, a word of limitation creating an estate tail; *Robinson v. Robinson.* (d) That case, however, went a great way, and the Judges have been disposed to narrow, rather than to extend the principle, and to rely on the effect of a subsequent limitation in default of "such issue;" *King v. Burchell* (e), *Frank v. Stovin* (g),
Stanley

(a) 1 *Russ.* 260.

(b) 9 *Rep.* 127.

(c) *Cit.* 1 *Fent.* 231.

(d) 1 *Burr.* 38.

(e) *Amb.* 379. 1 *Eden*, 424.

(g) 3 *East*, 548.

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Stanley v. Lennard (a), *Doe v. Webber* (b), *Doe v. Halley* (c), the last of which is an express decision, that under a devise to A. for life, with remainder to his eldest son (then unborn) and the heirs of such son, A. took no more than a life interest.

The 2000*l.* legacy, having lapsed by the death of *Mary Ann Martha Malcolm* under age and unmarried, must sink into the general residue. That sum was completely severed from the general mass of the funded property, and the legatees of that property do not take it subject to a charge in *Mary Ann Malcolm's* favour, but before it comes to them at all, it must first answer the legacies previously given, of which the sum in question was one. The money in the funds and the 2000*l.* are equally specific bequests; *Sleech v. Thorington* (d). A different construction would give to the legatees of the funded property a larger share of that property than the testatrix ever intended they should have. This is no more, therefore, than the case of a particular and a general residue, the latter of which, according to the settled rule, includes and carries every thing which in the result is not effectually disposed of. *Page v. Leapingwell* (e), *Green v. Scott* (g), *Tregonwell v. Sydenham*. (h)

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Four questions are raised upon this will; first, whether the residue of the money in funds (said to amount to 70,000*l.*) is given to *Maria Taylor* absolutely,

- (a) 1 *Ed.* 87.
- (b) 1 *B. & Ald.* 713.
- (c) 8 *T. R.* 5.
- (d) 2 *Ves. sen.* 560.

- (e) 18 *Ves.* 463.
- (g) 1 *Ves. jun.* 282.
- (h) 3 *Dow*, 194.; see also *Green v. Jackson*, p. 258. *supra*.

ately, or only for her life; in other words, whether or not the gift over of that residue to *John Malcolm* is good: secondly, whether the plate, books, and portraits are given absolutely to *Maria Taylor*, or only for her life, and then over to *John Malcolm*: thirdly, whether *John Malcolm*, if he takes either or both stock and plate, takes them absolutely, or only for his life: and fourthly, whether the lapsed legacy of 2000*l.* given to *Mary Ann Martha Malcolm* belongs to the residue of the stock, or to the general personal estate.

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Of these questions the most important, in my view, is the first; but the others, and especially the third, are also of considerable moment, with reference both to the amount of the interests involved, and the nicety of the arguments applied to it, the point being one by no means free from difficulty.

With a view to the first three questions, but especially the first, it is necessary to examine the scheme and structure of the will, from the first mention of the residuary fund under consideration. [The LORD CHANCELLOR read from the will the clauses of gift to *Maria Taylor* and her children, and proceeded:]

Here it is observable, that the plantation, funded property, and plate, are all blended together during the earlier part of the provisions; they are all then included in the gift to the first takers, *Elizabeth* and *Maria*; all three in the gift to the survivors; all three in the gift to *Maria Taylor*'s sole and separate use (the clause making her receipt a discharge being for *produce, profits, interest, or dividends*, words applying to all the descriptions of property); all three in the power of appointing to her children: and it is only when we come to the fifth provision that the plate is dropped,

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and in default of her appointment, the plantation and stock, without the plate, are dealt with. Both are given to *Maria Taylor's* children, share and share alike, their heirs and assigns; and if but one, the whole to that one, his heirs and assigns. Then comes a provision which does not extend to the plantation. This provision, confined as it is to the stock, is of much importance; for it postpones the vesting of an interest in it to the age of twenty-one in the case of sons, and twenty-one or marriage in the case of daughters; whereas the interest in the plantation is allowed to vest in the children, both sons and daughters, at their birth. The words are quite clear and express. In these circumstances no question is made upon the devise of the plantation. His Honor held, that it was given to *Maria Taylor* for life, with a power of appointing to her children, and in default of appointment, to her children, share and share alike, in fee; and if she have no children, then to *Mrs. Watson Taylor's* children; and it is clear, that if *Maria Taylor* had children, their interest vested at their birth. That the legacy of the stock did not vest, but was contingent, is equally clear.

We come now to the gift over of the stock, and every thing turns upon the reference made in that gift:—
“And in case *Maria Taylor* shall die without issue as aforesaid, I then give and bequeath, after the death of the said *E. G. Taylor* and *Maria Taylor*, the said residue of my money in the funds, and all my said plate, books, and portraits, &c., unto the said *John Malcolm*, and his assigns, for his life; and after his decease, I give and bequeath the same to his eldest son for ever.”

Suppose the clause had stood “without issue” alone, and the words “as aforesaid” had not been added, it might have been argued that this either meant a general failure

failure of issue, or a failure of such issue as last mentioned, namely, the issue to take the plantation; the gift over of the plantation being the last antecedent. In that case, such an argument might have been more easily maintained than it can when the words are followed by the expression "as aforesaid;" yet even standing alone they could not, without difficulty, have this latter sense imposed upon them, namely, of reference to the last antecedent; for the children are to take the plantation at their birth, and they are only to take the stock (being the subject of the gift over now under consideration) at twenty-one, or at twenty-one or marriage.

The words "as aforesaid," however, plainly refer further back, and aid us in assigning its true construction to the gift over.

In the first place, the natural use of these words points not to the immediately preceding clause, but to the more remote; they do not mean "last aforesaid." To convey that sense the phrase would have been simply "without such issue," or "without issue as last aforesaid." The expression "without issue as aforesaid" points to some preceding provision. Next consider what the testatrix is dealing with in this gift over. It is the stock; the plate also, I admit, — and that raises some doubt; but certainly not the plantation. Now the stock was not in any way the subject of the immediately preceding bequest, but it was the subject of the one before.

Had this gift over stood immediately after the clause providing for a default of appointment to the stock, and postponing the vesting of it, and had it so stood, without the addition of "as aforesaid," there could have been no doubt whatever, that the words "without issue" must have been held to mean such issue as is

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referred to in the preceding clause, touching the appointment and vesting. This is plain from the case of *Target v. Gaunt* (a), and in a great degree also from *Goodright v. Dunham*. (b) In the former, a term being given to *A.* for life, with remainder to such of his issue as he should appoint, and if he died without issue, remainder to *B.*, Lord *Macclesfield* held that issue in the gift over meant such issue as *A.* might appoint to under the preceding limitation, and that the executory bequest to *B.* was good. In *Goodright v. Dunham*, where the devise was to *A.* for life, and after his death to his children equally and their heirs, and in case he dies without issue, over, Lord *Mansfield* held “in case he dies without issue,” to mean “in case he dies without children;” because, he said, the gift over was tacked to the preceding clause.

Then does the mere separation of the gift over from the provision respecting the stock, prevent this reference? Are not the identity of the subject matter, namely, the stock, and the words of reference, viz., “as aforesaid,” sufficient, if not singly, yet taken together, to establish the connection between the gift over and the preceding provisions? The cases, such as *Salkeld v. Vernon* (c), *Doe v. Lyde* (d), *Rex v. Marquis of Stafford* (e), where issue has, in similar circumstances, been held to be a word of purchase, need not be referred to, or more than mentioned. In all of them the word issue was held to mean the children before referred to, — to lose the character given it by Lord *Hale* in *King v. Melling* (g), of being *nomen collectivum* of itself, and to assume that individuality which belongs to “children,” a word

(a) 1 *P. Wms.* 432.(b) *Doug.* 264.(c) *Eden*, 64.(d) 1 *T. R.* 593.(e) 7 *East*, 521.(g) 1 *Vent.* 531.

word that may be *nomen collectivum*, but only, as the same great authority has said, by being made so, and, as it were, against its natural sense.

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It is no doubt true, that to the construction here given it may be objected, that the plate is found to be covered by the words of the gift over, as well as the stock; and that the previous clause, to which one construction makes the gift over bear reference, comprehends the plantation as well as the stock. Of the former objection it may suffice to dispose when we come to the second question, which relates to the plate; and to the latter it seems a satisfactory answer, that although the plantation is dealt with in the former clause, yet so is the stock, the subject of the gift over, and that the stock is dealt with in a way wholly different from the plantation.

Again, the will, those parts of it at least under consideration all plainly look to children throughout, and provide for them. The scheme of the disposition is, generally speaking, to give to *Mrs. Watson Taylor's* family the plantation, and to *John Malcolm* the money in the funds, after *Maria Taylor* and her children.

No doubt, the manner in which this intention is to be made effectual in *John Malcolm's* favour, brings him in before the grand-children of the first taker (*Maria Taylor*) in the event of her children dying under age. But that does less violence to the general intent than giving to *Maria Taylor* an absolute interest in the money, and leaving out *John Malcolm* altogether. The objection, too, applies to the case of sons only, and not daughters; for the interest of daughters vests on their marriage; and the event of a son dying under age, and leaving children, is rarely contemplated in such arrange-

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ments. This is shewn by the fact, that the ordinary form of bequest, which is the one here used, does not provide for the vesting of an interest in sons upon their marriage. At all events, the violence apprehended is infinitely less when the possible exclusion is not that of the giver's own grand-children, but merely of the grand-children of a collateral, the first taker; and yet a construction exposed to this possibility is constantly adopted, even where the testator's own direct descendants may by possibility be the victims of it.

Upon the whole, therefore, I am of opinion that the gift over of the stock to *John Malcolm* is good, and that *Maria Taylor* did not take an absolute interest in it.

Secondly; Does the plate fall within the same rule and go over to *John Malcolm*, or did *Maria Taylor* take an absolute interest in it?

It is first given with the plantation and the stock to *Elizabeth* and *Maria* and the survivor for life, and after the survivor's decease, to *Maria's* children, as she may appoint. Here the plate is dropped, and no provision with regard to it is made in the event of *Maria Taylor* failing to exercise her power of appointment. So that in this first portion of the will there is no dealing with the plate to which, in construing the subsequent gift over, the words, "without issue as aforesaid," can be referred back. If, then, the construction as to the stock be a sound one, which refers those words to such issue as had been mentioned when dealing with the same fund in the former clause, and not to the issue mentioned when dealing with the plantation, by parity of reason, all reference back must be excluded in construing the same words as to the plate; inasmuch as there is nothing before mentioned touching the plate, in
connexion

connexion with the children, or with any thing to which issue can refer. The plate then will be given over on a general failure of issue; and whether from the gift being too remote, or from the gift to her being what, in the case of realty, would be an estate tail—it is indifferent which — *Maria Taylor* takes absolutely, and consequently the interest in this part of the property now vests in her personal representatives.

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Thirdly; Does *John Malcolm* take an absolute interest, or only for his life, in the part which goes over to him, that is, in the stock? That “son” may be a word of limitation is not denied; but there must be some plain reason for making it so. None of the cases from *Byfield’s case* downwards, certainly not *Robinson v. Robinson*, come at all near the violence which it would be doing to the obvious meaning of this clause to construe “eldest son” as *nomen collectivum*. As to the super-added words “for ever,” they clearly are only used to contradistinguish the interest which the eldest son of *John Malcolm* was to take, from that which *John Malcolm* himself was to take; the one for life, the other absolutely.

But the gift over is said to raise a different construction: — “In case the said *John Malcolm* shall die under age and without issue, I then give and bequeath the said residue of my said money in the funds, &c. unto the said *Mary Ann Martha Malcolm*.”

Supposing then that reading the gift over in the conjunctive (“and,” instead of “or,”) would have the effect of giving an estate tail to *John Malcolm*, if the property were real estate — a point which is disputed; and that, the property being personal, it would give the absolute interest to *John Malcolm*, we have here only a choice of difficulties,

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difficulties, as is but too frequent in such cases. If the clause is read conjunctively, then, by the supposition, *John Malcolm* would take an absolute interest to the exclusion of his son, to whom an absolute interest had just before been limited upon the determination of the life interest which was alone given expressly to *John Malcolm*. If, on the other hand, it is read in the disjunctive, though the son's interest may be defeated by the father dying under age, and yet leaving issue, viz., that son, in which case it would go over; yet that is only a possibility, whereas the other is a certainty; and it is, moreover, a possibility not contemplated in the ordinary case of such limitations, as I observed upon the first point, and not contemplated by this testatrix in the former part of the will, where she is disposing of this very same fund, or, at least, of what constitutes the bulk of it, the stock. It is fit that, in making our election between these difficulties, we keep in view the plain intention expressed of giving to *John Malcolm* a life interest, and to the eldest son, as a purchaser, an absolute interest expectant upon the determination of the former; and though we are not at liberty to reject the words which follow, for any apparent inconsistency with this intention, yet if there are two ways of reading them, one of which only frustrates the intention by a remote possibility, we should choose that rather than one calculated to operate a certainty of exclusion, more especially when such a possibility appears not to have been in the contemplation of the maker of the instrument.

It must, however, be admitted that the reading of "or" instead of "and" is rarely to be found sanctioned by decision. *Maberly v. Strode* (a) and one or two other cases of the same kind may be reckoned for nothing, be-
cause

(a) 5 Ves. 450.

cause the words would have been hardly sensible if read in any other way. That was a limitation to *A.* for life, and after his death to his children, but in case he died unmarried *and* without issue, over: if he died unmarried, he must, in contemplation of law, have died without issue. But in *Brownstord v. Edwards* (*a*), Lord *Hardwicke* read “and” as “or,” to effectuate the intention appearing on the will. The devise there was to trustees to receive the rents till *A.* should attain twenty-one or have issue, and then to *A.* and the heirs of his body, but if he died before twenty-one *and* without issue, then in trust for *B.*, his sister. *A.* died after twenty-one and without issue; and Lord *Hardwicke* supported the gift over to the sister by reading *and* as *or*. It has been said, and perhaps truly, that Lord *Hardwicke* would have felt much more repugnance to giving the words this construction, had any other event happened. And the Court of King’s Bench has certainly gone against, though they cannot be said to have overruled his decision in *Doe v. Jessep*. (*b*)

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The reason given by Lord *Ellenborough* for questioning the case of *Brownstord v. Edwards*, that in a will words are to be taken in their natural sense, is one which all must heartily wish could always be applied and taken as a general canon. But unfortunately it is too late; rules of technical construction are no longer to be rejected even in the case of wills; and the utmost that can now be done is to follow the natural sense of the words used in such instruments wherever those rules will permit us. It may be, I trust it certainly is, going much too far to say, with one of the learned counsel, that no conveyancer can give a safe opinion upon any one case on the law of real property which comes before him in the twenty-four hours. Nevertheless it cannot be

(*a*) 2 *Ves. sen.* 243.

(*b*) 12 *East*, 288.

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be denied that much uncertainty has been introduced into this branch of the law. This is not, however, to be imputed solely to the adoption of technical rules. It has been in part owing to not keeping by the technical rules once introduced. The struggles in favour of intention, sometimes made on the ground of natural meaning, sometimes on the ground of other rules as technical as those striven against, have been a fruitful source of this uncertainty, and in more instances than one a recurrence to the original technical principle has been seen to sweep away a multitude of intermediate decisions, while the new decisions are found to leave unsettled almost as much as they have fixed.

Against the construction now given to this part of the will it is needless to say that objections may be raised from cases which may be put, in which a result would take place most unlike any the testatrix could have thought of. But that is not peculiar to this case; it may be said to happen, and almost of necessity, in every instance where a gift over is frustrated by being limited on a general failure of issue. Upon the whole I do not differ with his Honor in his construction of the gift to *John Malcolm*, holding that he takes a life interest only in the testatrix's money in the funds.

Fourthly; there remains only the question as to *Mary Ann Martha Malcolm's* lapsed legacy of 2000*l.*; and I cannot read the will and doubt that it belongs to the particular residue. That residue is given thus, — “all the residue and remainder of my money in the funds after payment of the annuities and legacies herein-before bequeathed,” of which the legacy that has lapsed is one.

The result is that, upon all the four points, the judgment of the Master of the Rolls must be affirmed.

1851.

In re ROBINS.

1851.
March 4. 8.

THIS was an application for the appointment of two committees of the lunatic's estate, not jointly in the usual way, but that one committee might be appointed of the *Warwickshire*, and another of the *London* property. The estates were of great value; that in *Warwickshire* consisting partly of coal mines which required considerable superintendence; and the other chiefly of houses and other leasehold property in *London* and *Middlesex*, with a rental amounting to more than 3000*l.* a year.

In a case where a lunatic had two estates situate at a distance from each other, and of considerable value, the Court under the circumstances appointed a separate committee for each.

Mr. *Tinney*, in support of the application, observed that nothing was more common in practice than for two committees, who were appointed jointly, to divide the management, and each take a portion of the property under his peculiar charge. From family circumstances, however, that could not conveniently be done here. But it was of the utmost importance that there should be persons resident on the spot to manage the respective properties, which were of a nature to call for all the vigilance and activity of separate committees. The proposed arrangement, besides, was one which, while it would be conducive to the interest of the lunatic's estate, would be more satisfactory than any other to all the parties having expectant interests.

The heir at law and next of kin made no objection.

The LORD CHANCELLOR at first said that he had great doubts, as the case seemed to be without precedent. But he afterwards stated that he had been furnished with an authority by Master *Dowdeswell*, which
was

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was on all fours with the present case: he therefore directed the order accordingly, as it would be much more convenient for the estate and for all parties.

1852.

Feb. 9, 10. 29.

SMITH v. NETHERSOLE.

A writ of *ne exeat regno* will not be granted to a Plaintiff residing in a foreign country.

THE Solicitor-General (Sir *William Horne*) and Mr. *Burge*, for the Defendant, moved that a writ of *ne exeat regno*, which had been granted in this case, might be dissolved. The bill was filed in September 1831 for an account of the partnership dealings and transactions between the Plaintiff and Defendant, as vendue-masters in the island of *Jamaica*. One of the grounds taken in support of the motion was, that though the Plaintiff, when he filed the bill, was in this country, having made the necessary affidavit at *Sittingbourne* in *Kent*, yet that his coming to *England* was only for that special purpose, and that his usual place of residence was in *France*. *Hyde v. Whitfield* (a) was referred to.

Sir *E. Sugden* and Mr. *O. Anderdon*, *contra*, cited *Grant v. Grant*. (b)

Feb. 29.

THE LORD CHANCELLOR, on the ground that the Plaintiff resided abroad, and that his visit to this country was colorable and temporary only, discharged the writ.*

(a) 19 *Ves.* 342.(b) 3 *Russ.* 598.

* In *Douglas v. Terry*, 4th Nov. 1855, where the Plaintiff resided in *Scotland*, the Vice-Chancellor upon that single ground discharged the *ne exeat*, following the authority of *Smith*

v. Nethersole; and in a previous case of *Walker v. Christian*, 3d March 1855, also before the Vice-Chancellor, the same, among other objections, was successfully taken. *Ex relatione Mr. Wakefield*.

REPORTS

OF

CASES

ARGUED AND DETERMINED

1831.

IN THE

HIGH COURT OF CHANCERY.

GARRARD *v.* Lord LAUDERDALE.

1831.
Jan. 27. 29.
Feb. 11.

THE facts of this case, as they appeared upon the bill and answer, are fully stated in Mr. *Simons's* Report on the hearing of the motion before the Vice-Chancellor. (*a*)

His Honor having refused the Plaintiff's application, it was now renewed before the Lord Chancellor.

Mr. *Knight* and Mr. *Rogers*, for the motion.

Sir

(*a*) 3 *Sim.* 1.

A person by deed conveyed to trustees certain personal property, upon trust to sell the same, and, after satisfying certain specified charges and claims in a prescribed order out of the proceeds, to divide the residue among his scheduled creditors,

none of whom were parties or privy to the execution of the deed. The trustees, after partially executing the trusts by making sales and paying off the specified charges and claims in the order directed, concurred with the grantor in doing several acts inconsistent with the subsequent trusts: Held, that after the death of the grantor a scheduled creditor had no equity against the trustees to enforce the execution of the trusts, the conveyance being in the nature of a private arrangement for the personal convenience of the grantor, and vesting no right in the creditors.

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Sir *Edward Sugden*, Mr. *Pepys*, Mr. *Lynch*, and Mr. *Wigram*, *contra*.

The same general line of argument was followed by the counsel on both sides as had been taken in the Court below. The following additional cases were also cited and commented upon:—*Stephenson v. Hayward* (a), *Sloane v. Cadogan* (b), *Ex parte Pye* (c), *Pulvertoft v. Pulvertoft* (d), *Ex parte Heywood* (e), *Scott v. Porcher*. (g)

Feb. 11.

The LORD CHANCELLOR.

This case was argued before me at considerable length; and as it was one which seemed likely to be of general importance from the frequency of such trust deeds for the payment of debts, and as it was strongly urged that the decision of the Vice-Chancellor was at variance with the current of authorities, I took time to consider my judgment, and I also procured a copy of the papers in the case of *Wallwyn v. Coutts* (h), on which case his Honor was said to have relied; but I see no reason for departing from the decision which was pronounced in the Court below.

[His Lordship then stated the effect of the trust deed, and proceeded:—] This deed, though for a very meritorious purpose, must be considered as to all intents a voluntary conveyance, even assuming it to be in the strictest sense of the term a trust deed. Now it has been held, ever since the case of *Leech v. Leech* (i), in
the

(a) *Prec. Ch.* 310.(b) *Sugd. V. & P.* App. No. 26.(c) 18 *Ves.* 140.(d) *Ibid.* 84.(e) 2 *Rose*, 355.(g) 3 *Mer.* 652.(h) 3 *Mer.* 707, and more fully
in 3 *Sim.* 14.(i) 1 *Ch. Ca.* 249.

the time of Lord *Nottingham*, that a voluntary conveyance, though void as against a purchaser, is, nevertheless, good as against the representatives of the person who executes it; and I cannot, therefore, but doubt the accuracy of that part of the report of *Wallwyn v. Coutts*, where Lord *Eldon* is represented to have said, he refused the motion on the ground of the trust being voluntary, and, consequently, a trust which could not be enforced against the Duke of *Marlborough* and his son the Marquess. Lord *Eldon*, who, in deciding *Ellison v. Ellison* (a), had stated the principle so distinctly, and who, again and more recently, had deliberately recognised it in *Pulvertoft v. Pulvertoft* (b), could hardly, I think, have so expressed himself. In the first of those cases his Lordship laid down what has ever since been the rule, taking the distinction between a trust executed, where a right vested, and a trust which rests *in fieri*, not executed; and he said (in conformity with his own subsequent decision in *Pulvertoft v. Pulvertoft*), that when the deed was so executed, he would allow the *cestui que trusts* to appear in Court, and would take notice of their existence, and enforce their rights both against the trustees and against the maker of the instrument; but that it was otherwise where the relation had never been fully established, the matter only resting in covenant; and that in such a case he would not interfere.

The ground of this distinction between cases where the matter rests *in fieri*, and those where the instrument is executed and the relationship of trustee and *cestui que trust* created, is somewhat obscure; and perhaps a simpler course in the first instance would have been not to give effect to any voluntary conveyance (whether

(a) 6 *Ves.* 656.

(b) 18 *Ves.* 84.

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(whether executed or not), either against purchasers as to whom it would, of course, be void by statute, or against the grantor himself. But I am here to deal with the principles as I find them settled by the uniform tenor of decisions; and the rule, as laid down in *Colman v. Sarrel* (a), and afterwards adopted in *Ellison v. Ellison*, and *Pulvertoft v. Pulvertoft*, is not now to be controverted, that the relationship will not be established against the author of a voluntary conveyance, but that wherever the Court finds it already constituted, the relationship will be followed out and enforced.

Is, then, *Wallwyn v. Coutts* inconsistent with these cases? For it was strongly pressed upon me that that case could only be supported by overruling all the former authorities; and it was further argued, that *Wallwyn v. Coutts* would be found to differ from them in this respect, that there the second deed was for consideration. If that had been the fact, the case, as I observed at the time, would have been utterly valueless — not worth the paper on which it was printed; for it would only have affirmed a proposition which never was disputed, namely, that, as against a purchaser, a voluntary conveyance could not be enforced. It is satisfactory to find that there is not a shadow of foundation for that suggestion. There were there three deeds, and *Wallwyn* claimed under the first; but neither was any creditor a party to it, nor was there any consideration moving from a creditor. That case is on all fours with the present, with perhaps this single exception, that there are expressions favouring very much the idea that the deed was not to be considered as vesting an authority in the trustees; for the creditors were to be paid on the request of the Marquess of *Blandford*, who
rather

(a) 1 Ves. jun. 50.

rather stood in the shoes of the creditors than of the author of the deed. I recur, then, to the question, Is *Wallwyn v. Coutts* inconsistent with the former cases? The same judge decided that case who had decided *Ellison v. Ellison*, and *Pulvertoft v. Pulvertoft*; and Lord Eldon was not likely rashly to make a decree inconsistent with another which he had pronounced but a short time before. Upon the principle laid down in *Ellison v. Ellison* it is clear that no particular form of words is necessary to constitute a trust; but I take the real nature of this deed to be, like that in *Wallwyn v. Coutts*, not so much a conveyance vesting a trust in *A.* for the benefit of the creditors of the grantor; but rather that it may be likened to an arrangement made by a debtor for his own personal convenience and accommodation, — for the payment of his own debts in an order prescribed by himself, — over which he retains power and control, and with respect to which the creditors can have no right to complain, inasmuch as they are not injured by it, they waive no right of action, and are not executing parties to it.

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Hill v. Secretan (a), *Williams v. Everett* (b), and *Scott v. Porcher* (c) depend rather upon the principles which are applicable to this species of arrangement. The first of those cases, indeed, in which it was ruled that if *A.* consigns goods to *B.*, to be held for the benefit of *C.*, the latter has such an interest therein that he may effect an insurance upon the goods, has always been considered as going to the very verge of the law. But in the later and much greater authority of *Williams v. Everett*, it was decided, that where there was no privity between the parties, the proceeds of bills received by *A.*, to whom they were remitted by *C.*, is money had and

(a) 1 Bos. & Pull. 315. (b) 14 East, 592. (c) 3 Mer. 652.

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and received not to the use of *B.*, the creditor for whom the bills were to be held, but to the use of *C.*, the party remitting them; the Court there holding, consistently, that this is in the nature of a voluntary arrangement by the person who owes the money. *Scott v. Porcher* was precisely the same case, occurring in a court of equity; for that is the case of a mere mandate, revocable by the party who consigned the goods.

Now two things, if not more, were done in the lifetime, and by the authority of, the Duke of York, which were inconsistent with the continuance of the arrangement in the present case. His Royal Highness himself paid off several of the scheduled creditors, and to a large amount in the whole, out of monies of his own; and further, the trustees, by his direction and at his request, paid back to him a considerable portion of the fund which the trust deed had placed in their hands; circumstances tending strongly to shew the intent and understanding of the parties themselves with respect to the nature and effect of the transaction. It is unnecessary, therefore, to inquire what might have been the case if the party executing the instrument had never thought fit to do any act inconsistent with its provisions; but the question might then be liable to a very different consideration. The motion to discharge the Vice-Chancellor's order must be refused. (*a*)

(*a*) This case has been referred to and considered in several subsequent cases, particularly in *Acton v. Woodgate*,

2 *Mylne & Keen*, 492., *Bill v. Cureton*, *ibid.* 503.; and see also *Petre v. Espinasse*, *ibid.* 496.

1831.

FITZGERALD v. STEWART.

March 1.

THE circumstances of this case, as they appeared upon the bill, are fully stated by Mr. *Simons* in his report upon the argument of the demurrer in the Court below. (a)

The Vice-Chancellor having overruled the demurrer, the Defendants, *Stewart* and *Westmorland*, appealed from his Honor's decision.

Sir *E. Sugden* and Mr. *Burge*, in support of the appeal, submitted that, assuming the facts set forth in the bill to be true, no case of lien was made out by the Plaintiff as against Messrs. *Stewart* and *Westmorland*; and they referred to the cases of *Garrard v. Lord Lauderdale* (b), *Worrall v. Harford* (c), *Ex parte South* (d), *Scott v. Porcher* (e), and *Williams v. Everett*. (g) They further contended, that the subject of the suit was properly cognizable in the Court of Chancery in *Jamaica*; and that this Court, therefore, ought not to interfere.

Mr. *Pepys* and Mr. *Roupell*, who appeared in support of the bill, were not called upon to argue the case.

The LORD CHANCELLOR.

Though I shall in this case affirm the judgment of the Vice-Chancellor, I shall certainly not do so on the grounds stated in the report of his Honor's judgment.

His

Where consignments have been made from abroad to answer an annuity which the owner of the property consigned is liable to pay, and the consignee in this country gives notice of the arrangement to the annuitant, and makes payments in pursuance of it, the consignee is not afterwards at liberty to discontinue such payments, so long as he has any proceeds of the consignments in his hands.

The circumstances of such a transaction constitute an implied trust, which the Court will enforce against the consignee, for the benefit of the annuitant

(a) 2 *Sim.* 333.

(d) 3 *Swan.* 392.

(b) 3 *Sim.* 1. & p. 451. *supra*.

(e) 3 *Mer.* 652.

(c) 8 *Ves.* 4.

(g) 14 *East*, 592.

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His Honor, according to that report, after observing that he does not mean to unsettle the law as laid down in the case of *Williams v. Everett* (a), states two circumstances as the foundation of his decision in the present case, — the one that the receipt of the money had been notified to the Plaintiff, and the other that the bill alleged that an express trust had been created.

These are reasons to which I cannot accede. The first existed in the case of *Williams v. Everett* even more remarkably than here; yet the decision there was in favour of the consignee. That was a case of bills remitted by a debtor to his agent or consignee, with a letter ordering him to pay the debts due from the party making the remittance, and, among the rest, that to *Williams*, and that the balance should be held for his use; but the debtor directed that the title of each creditor to receive such payment should be the production by the creditor, of a letter of advice from the debtor notifying the arrangement. *Williams* accordingly produced such a letter, and made the demand, as is stated by Lord *Ellenborough* in his judgment. It is not, therefore, a correct representation, and it tends to confound our ideas of law, to say that *Williams v. Everett* differed from the present case in the circumstance of the notification. The judgment there proceeded entirely on the want of all privity, and on the fact that there was no adoption by the consignee. And the language of Lord *Ellenborough*, when he speaks of the defendants agreeing to hold the profits, when paid, until, by some engagement entered into, they have precluded themselves from receding from their contract, points to a circumstance which raises a material distinction between *Williams v. Everett* and the present case, and one directly applicable to the latter.

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(a) 14 *East*, 582.

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If I were to allow this demurrer, I should be carrying the rule laid down in *Williams v. Everett* a great deal further; for that was a case where, so far from an assent, there was a refusal to recognize the arrangement. It cannot be denied that, in the case under appeal, the annuitant would have a right to complain if, on a sudden, the consignees were to stop the payment of her annuity. For it is not pretended that she would be entitled to have the annuity paid out of the consignments, whether there were or were not sufficient funds to answer the amount of her demand. The bill only goes to this extent, — that the consignee, by his acts, has subjected himself to hold the consignments subject to the annuity, so far forth as the funds may be sufficient for the purpose; whereas in *Williams v. Everett*, the creditors who received the letter gave up nothing, and had no compliances made to them; on the contrary, they met with a flat refusal.

In order to make that case similar to the present, the creditor should have received a part of the debt, and an assent *rebus ipsis et factis* to the payment of the rest. Could *Everett* then have turned round after paying half of what was due under the order, after lulling the creditors into security, — could he then have refused to fulfil his contract? That is the case here. These Defendants pay the annuity for one year; and I must, in passing, observe, that I cannot accede to the doctrine that an annuity is to be taken by piecemeal, as so many separate transactions: on the contrary, it is all one transaction. The Defendants have duly paid it for a certain time; and after leading the Plaintiff to expect that they would continue so to pay it, they turn round and repudiate their own act. Now, on the authority of those cases, that cannot be permitted; and I should be carrying the principle a great step further if I were to extend

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extend it to cases where the consignee had assented to the arrangement of the debtor.

As to this being an express trust, by which I understand a trust created, not by facts and circumstances, but by express words, there is no such trust here — the Court is left to raise it by implication of law from the dealing and conduct of the parties. The nature of the agreement is much more correctly stated in the argument of the counsel in the Court below, than in the language ascribed by the report to the learned Judge. There is no express trust, nor any thing like it — all that the Plaintiff contended for below was, that there were facts and dealings in the case which sufficiently indicated the assent of the consignees, and from which, by implication, the relation of trustee and *cestui que tru* might be fairly considered to be constituted.

Upon these grounds, and not upon any of those attributed to his Honor, I have no difficulty whatever in affirming this judgment.

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ATTORNEY-GENERAL v. The Archbishop of YORK. *March 5.*

THIS was an information filed by the Attorney-General, without a relator, and proceeding upon the certificate of the charity commissioners under the provisions of the 59 G. 3. c. 81. The Defendants were, the Archbishop of *York*, the Dean of *Rippon*, and the corporation of the master, brethren, and sisters of the Hospital of *St. Mary Magdalen*, at *Rippon*.

Reference to settle a scheme for the application of the revenues of an ancient hospital, of which the original foundation and endowment were unknown, but of which the master, after paying a certain fixed yearly stipend to a chaplain, and also to six alms-women who had apartments in the hospital, and defraying the repairs, applied the surplus income to his own use.

The information stated, that, in the early part of the twelfth century, *Thurstan*, then Archbishop of *York*, founded an hospital, called the Hospital of *St. Mary Magdalen* at *Rippon*, for the relief and support of sick indigent persons, and that the hospital became seised of very considerable real estates; that the original institution consisted of a master and chaplain, brethren and sisters, who many years ago were incorporated under the name of the master, brethren, and sisters of the Hospital of *St. Mary Magdalen* at *Rippon*; that the particulars of the foundation, or the time of the incorporation, could not now be discovered; that within the last two centuries the establishment had at different times considerably varied, but that for many years past there had been no brethren upon the foundation, and that the present establishment consisted of a master, chaplain, and six sisters; that the master, brethren, and sisters, had been for many years past seised of the lands and hereditaments in the information particularly mentioned; that, by the will of one *William Spink*, a sum of 7*l.*, yearly charged and payable as therein mentioned

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mentioned, was given for the benefit of the said six sisters and chaplain of the said hospital; and that there were also other sums now remaining in the hands of the Defendant, the present master of the hospital, which formed part of the funds of the hospital, and were applicable to the purposes thereof. The information then stated, that the right of appointing the master had, for a long series of years, been exercised by the Archbishop of *York* for the time being, and that such appointment, ever since the establishment of the Collegiate Church of *Rippon*, in the year 1606, had been uniformly made by the Archbishop in favour of the dean of the said church for the time being, as an augmentation to the revenues of the deanery, which were of small amount: that in the year 1792, the mastership of the hospital was accordingly given to the Defendant *Waddilove*, the Dean of *Rippon*, who had ever since been, and still was, the master: that the chaplain and sisters had been from time to time appointed by the master for the time being; and that the sisters were poor persons selected by him as fit objects of charity, and that one of them at present received parochial relief: that the principal part of the estates of the hospital had been, for above two centuries past, granted out upon leases for lives, at certain small rents, which had never been raised, but that the leases had been from time to time renewed on payment of fines; and that such leases had been always granted in the name of the master, brethren, and sisters of the hospital, and under their common seal, although the same had for many years been granted by the master for the time being at his own discretion: that the actual value of the property belonging to the hospital amounted to the sum of 464*l.* annually, and that there was also some valuable timber on the estates: that the master had paid the expense of keeping the buildings of the hospital in repair,

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repair, and also 10s. a year to the receiver of the rents, and divided a sum of 10*l.* yearly among the five elder sisters of the hospital equally; and that subject to such payments, he had applied to his own use the whole of the rents and profits of the charity estates, including the fines upon renewals, except the rent of a small field adjoining the hospital, let for the sum of 2*l.* 5s. a year, which sum was equally divided among the five elder sisters; and that the six sisters had also the use of the apartments in the hospital, and of the produce of the garden.

The information charged that the same proportion of the rents, namely, a sum of 10*l.* per annum, was applied to the use of the sisters of the hospital, at a period when the present reserved rents were the full annual value of the property; and that as such value had increased, and had been received in the shape of fines upon renewals, a proportionate increase ought to have been made in the stipends of the sisters, and some allowance ought to be made for the chaplain. The information then submitted that the present appropriation of the charity funds was inconsistent with the purposes of the foundation, as far as the same could be discovered; and, after stating as a pretence that the Defendant, the Archbishop of *York*, alleged that, by virtue of his office, he was the special visitor of the hospital appointed by the founder, and that the Court, therefore, had no jurisdiction over the same, it charged that the hospital had no special visitor appointed by the founder, and that no right of visitation had ever been exercised either by the Archbishop or his predecessors; and it prayed an account of the charity estates and a reference to the Master to settle a scheme for the application and distribution of the rents and profits in future.

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The several Defendants put in answers, admitting the facts stated in the information. The Defendant, the Archbishop of *York*, by his answer, stated his belief that the Archbishop of *York* for the time being had always had the appointment of the Master, and that the Master on his election always took an oath to the Archbishop, of obedience to him and his successors. He admitted that he had never exercised any visitatorial power.

The answer of the Defendant, the Dean of *Rippon*, who was also Master of the hospital, denied that the present application of the charity funds was inconsistent with the purposes of the foundation as far as the same could be discovered, or that any directions ought to be given by the Court for the regulation of the charity and the future application of its revenues; for the Defendant submitted that the present mode of distributing the revenues having been sanctioned by such long usage, ought not now to be disturbed; and, at all events, that the hospital was to be considered as an ancient ecclesiastical endowment, in the patronage, and subject to the visitation and superintendence of the Archbishop of *York* for the time being, and that the Archbishop was to be considered as the special visitor thereof, deriving his right from the founder, and that as such, he was the proper and only person authorised to superintend and regulate and make alterations in the general conduct and management of the charity.

The Vice-Chancellor dismissed the information without calling upon the counsel for the Archbishop of *York* to argue the case, and the Attorney-General thereupon appealed.

The Solicitor-General (Sir *W. Horne*) and Mr. *W. Brougham*, in support of the information.

Mr.

Mr. *Skirrow*, for the Archbishop of York.

Mr. *Bagshawe*, for the Dean of Rippon.

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The different arguments urged by the counsel for the Defendants are adverted to in the Lord Chancellor's judgment.

The LORD CHANCELLOR.

In this case several conflicting, or, at least, very various grounds have been taken in support of the decree, and, among others, one upon which, if it be not got rid of at the outset, the present decision must be supported, although I have no reason to think it was at all pressed on the attention of the Court below. On the contrary, indeed, this first point does not appear to have been made before the Vice-Chancellor, because the party interested in taking and insisting upon it was not heard upon that occasion.

It is urged, that in the seventh section (a) of the 59th of the late King c. 81., a section which is copied from the former act, (58 G. 3. c. 91. s. 12.), this charity is exempted from the jurisdiction of the Court, because it has a special visitor. There are, however, two grounds upon which such an argument seems to me to be untenable. First, even if the fact had been so (and for that purpose there must, by the words of the clause, be a special visitor appointed by the founder), that does not exclude the jurisdiction of this Court, but would only make what the commis-

(a) This section (among other things) provides that the act shall not extend "to any college, free-school or other charitable institution or donation or

charity whatsoever, which has special visitors, governors, or overseers appointed by the founders."

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commissioners have here done an irregular proceeding. They might inquire respecting the charity, and might give their instructions to the Attorney-General, who, if he thought proper, might still bring the case before me. I have no knowledge of the commissioners, or of the manner in which this information was filed. A stage in the cause will afterwards occur when that circumstance may be material; either when the question of costs comes to be determined, to be answerable for which is the purpose of having a relator named, or when the right of appeal is intended to be asserted. In the latter case, if these proceedings have been regularly instituted under the powers given by the act of parliament, the right of appeal is cut off, and the decision of this Court is made final and conclusive. All I can do at present is to know that the proceeding is now here; since the Attorney-General may always, if he thinks it for the public interest, file the information *ex officio*.

My second answer to the objection is, that this case does not fall within the exemption in the act; and I am clear that it does not. I cannot allow it to be stated that such an objection is the legitimate inference to be collected from the principles laid down in *Philips v. Bury*. (a) In that case, which is one of great authority, Lord *Holt* has laid it down, that every incorporated charity must, if ecclesiastical, have the ordinary for its visitor; if lay, the patron. Now all that is proved, and, indeed, contended for, before me is, that the patron is the Archbishop of *York*. And, no doubt, he is; but it is not thence to be inferred that, because Lord *Holt* has said, that where the hospital is lay the patron is the visitor, therefore, for default of a special visitor, the patron is a special visitor. The very reverse, indeed, is
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(a) 2 T. R. 346.

the fact; since he only can be a special visitor who is specially named and appointed by the founder. And such is the language of the statute; for by the seventh section, which exempts certain charities from the jurisdiction of the commissioners, the operation of the act is confined to such charitable institutions as have no special visitor appointed by the founder. In such cases, to use the language of Lord *Holt*, the corporation, if spiritual, has for visitor the ordinary, if lay, it has the patron; not the patron appointed as visitor, but the patron taking the office for want of a special appointment. Suppose, for example, the founder should appoint a warden without appointing a visitor; it by no means follows that, because a statute afterwards appoints that person to be visitor whom the founder had appointed to be warden, the person so appointed should become the special visitor; or that from that circumstance, on any reasonable construction, the founder, and not the legislature, should be held to have made the appointment of the visitor. He appointed the warden, and that was all. Upon both of these grounds I am clearly of opinion, that the jurisdiction of this Court is not ousted by the act of parliament.

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The next question is, Was this a beneficial interest, or was it a trust? And upon all the circumstances of the case, and upon the whole of the evidence, my opinion is, that it was a trust only. It may be observed that the patron, who clearly is the archbishop, does not seem to put in any claim to it; and though Lord *Holt* lays it down that the patron is the visitor, there is not a shadow of pretence for holding that the archbishop ever exercised his rights as visitor, but on the contrary, as far as appears, he has repudiated that character. When I recollect, moreover, that the prelates are so jealous, and very properly so jealous, in watching over their

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visitatorial powers and privileges, there is a very strong presumption against the existence of the visitatorial power in this instance, and that the archbishop is not in any sense — neither in the sense in which Lord *Holt* uses the expression when he speaks of a patron being the visitor, nor in the sense of an actual visitor — a person who has been vested with that power. No particular words are necessary to constitute a visitor. Not can any man doubt what the powers of a visitor are. In practice they are perfectly uncontrolled — of removal, new appointment, variation, and alteration. They are, in truth, of a most extensive and arbitrary nature; and in a celebrated case of the Archbishop of *Canterbury* (a), it was laid down, that in his capacity of visitor, an archbishop may refuse a licence; and that the Court could do no more than put by *mandamus* the visitatorial powers in motion, which might then move in a directly opposite direction to what the Court wished or intended, the visitor being at liberty to pursue his own course without assigning any reason. The visitor has only to move, and then the case is without review. These powers are perfectly well known; and it is therefore singular that it is not pretended that such visitatorial powers were ever used either by the present or by any former archbishop.

Upon the rest of the case, I am still more at a loss to see how it can be pretended that the principal Defendant here, the master of the hospital, has an exclusive beneficial interest in the surplus. He is appointed by the archbishop to be the master. That appointment gives him the mastership, the right to be pernant of all the profits, and it makes him subject to all the duties; but the question is, Does he in his capacity of master take
 beneficially

(a) 15 *East*, 117.

beneficially or as trustee? On the whole of the evidence, I have no doubt that it would be doing violence to the institution to consider that, in virtue of the appointment, he does any thing more than take the profits *quâ* master, it being admitted that he does not take them by his institution as Dean of *Rippon*. When an existing foundation receives a new endowment, which in no respect alters the original constitution, there is no necessity to have a separate appointment to each, if the two are inseparably annexed. In such a case, assuming it to be necessary that the master should have institution and induction, the institution and induction to the deanery would be also institution and induction to the hospital. No such thing, however, is alleged here; but first there is an induction to the deanery, and then there is institution and induction to the hospital, the patronage of the former being all the while vested in the crown.

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The revenues must be applied according to a scheme to be approved by the Master; and the Dean must be at liberty to carry in proposals, and his suggestions will no doubt be attended to.

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March 15. **WARE v. The GRAND JUNCTION WATER WORKS Company.**

Injunction to restrain the Grand Junction Water Works Company from applying to parliament for an act authorising the company to procure its supply of water by means of an aqueduct from the river *Colne* instead of the *Thames*, as authorised by the existing acts under which it was incorporated, refused.


A court of equity will not, at the instance of a shareholder, restrain a joint stock company incorporated by acts of parliament which prescribe its constitution and objects, from applying in its corporate ca-

capacity to parliament, and from using its corporate seal and resources to obtain the sanction of the legislature to the remodelling of its constitution, or to a material alteration and extension of its object and powers.

The right of making such an application is incident to a joint stock company of that description.

BY an act of parliament passed in the 51 G. 3. (c. clxix.), and intituled "an act for confirming certain articles of agreement entered into between the Company of Proprietors of the Grand Junction Canal and certain persons, for supplying with water the inhabitants of the parish of *Paddington*, and the parishes and streets adjacent, in the county of *Middlesex*," it was enacted, that certain articles of agreement made between the said Grand Junction Canal Company and one *Samuel Hill* should be absolutely confirmed; and the said company were thereby empowered and authorised to demise, lease, and to farm let unto a company of proprietors who were thereby to be constituted, their successors and assigns, the powers and authorities comprised in the said articles of agreement for the term and upon the conditions in the said articles of agreement mentioned. The act then proceeded to declare that the persons therein named, being proprietors of shares in the undertaking to be executed under that act, should be united into a company for the making, completing, improving, and maintaining the water works, aqueducts, reservoirs, and other works necessary for effectuating the purposes of the agreement before mentioned, and should for that purpose be a body politic and corporate by the name of "**The Grand Junction Water Works Company,**"

Company," and by that name have succession, and have a common seal; and for carrying into effect the said purposes, and constituting and upholding the said works, the new company was thereby empowered to raise by subscription among themselves the sum of 150,000*l.*, in 50*l.* shares, which were to entitle the holders to a proportionate share of the profits of the undertaking; and also (should it be required) to raise a further sum of 150,000*l.* for the purpose of maintaining and completing such reservoirs, aqueducts and other works, upon the terms and in the manner therein mentioned. The act then proceeded to lay down regulations respecting the transfer and disposition of the shares and the general superintendence and management of the affairs of the company; and to make particular provisions for the holding of half-yearly general assemblies, and also for the holding of special general assemblies of the proprietors; and authority was given to the company at such assemblies to order and dispose of the custody of their common seal, and the use and application thereof, and to make rules, bye-laws, and orders for the good government of the company, their servants and agents, and for the superintendence and management of the said undertaking, and also from time to time to alter and repeal such bye-laws, rules, and orders; and it was declared that such bye-laws, rules, and orders when reduced into writing under the common seal of the company, should be binding upon all the proprietors, provided they were not repugnant to the laws of *England* or to the provisions contained in that act.

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By another act (56 G. 3. c. lxxxv.), further powers were given to the Grand Junction Water Works Company with respect to the mode in which the last-mentioned sum of 150,000*l.* might be raised; and it was enacted, that the proprietors of the shares thereby


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created, should stand in all respects upon the same footing with the proprietors of the original shares. By a subsequent act (59 G. 3. c. cxi.) the proprietors of the *Regent Canal* were authorised to supply the reservoirs, pipes and other works of the Grand Junction Water Works Company, for the general purposes and objects of the said company, with water from the river *Thames*, by the means and according to the powers and regulations therein mentioned; and certain arrangements were sanctioned between the proprietors of the *Regent Canal*, the Grand Junction Canal, and the Grand Junction Water Works Company for the common advantage of those different corporate bodies.

By another act (7 G. 4. c. cxl.), which was made to amend the acts already referred to, the proprietors of the Grand Junction Water Works Company were thereby confirmed and established in perpetuity, as a company for making, improving, completing, and maintaining water works, aqueducts, reservoirs, and other works necessary for the purpose of providing and supplying with good and wholesome water from the river *Thames*, the inhabitants of the several buildings erected and to be erected in the parishes and districts aforesaid; and their character as a body corporate was also confirmed, and power was given to them and their successors, by themselves and their agents, to make, complete, and maintain water works, aqueducts, reservoirs, water wheels, steam-engines, pipes and other works necessary for supplying the aforesaid inhabitants with water to be drawn from the river *Thames* at or near *Chelsea*, and to supply such water works accordingly with water from the said river to such extent and under such restrictions as were expressed in the said act of the 59 G. 3. but not further or otherwise. And it was further enacted that all the powers, provisos, regulations,


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regulations, and restrictions, contained in the said acts of the 51st & 56th G. 3. respectively, except in so far as they were thereby varied or repealed, should continue in force and apply to the Grand Junction Water Works Company thereby incorporated in perpetuity; and the said company was also empowered to apply a certain specified proportion of the gross yearly income derived from the water-rents, towards the improvement, extension, or restoration of the buildings, reservoirs, aqueducts, engines, pipes, and other works for the time being vested in the company, or in the purchase, erection, or completion of any new or additional buildings, ground, reservoirs, aqueducts, engines, pipes, or other works which should from time to time be thought necessary or convenient for the purposes of the said undertaking.

The bill, which was filed by one of the proprietors, suing on his own behalf only, against the Grand Junction Water Works Company and their clerk, after setting forth the substance of these several enactments, stated that a large sum of money had been contributed by the company of proprietors and had been applied in the construction of the works authorised by the acts in question, which works were now maintained at a heavy expense, and that the undertaking had become profitable: that by means of the water-rents levied under the provisions of the acts a large income had of late years been produced which was divided among the proprietors in proportion to the number of their respective shares: that the Plaintiff had at different times purchased shares in the company, and that previous to the month of *November* 1830, he was, and still continued to be, the holder of seventy of such shares: that several of the members of the company, some of whom were now directors, had formed a design to depart from the provisions of the last-mentioned act of parlia-


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ment whereby the company were empowered to make and maintain the several works therein mentioned for the purpose of supplying the inhabitants of the said parish of *Paddington*, and parishes and streets adjacent, with water to be drawn from the river *Thames*, at, or near *Chelsea* aforesaid, and to supply such water works accordingly, and in lieu of the same intended and proposed to make a new cut or aqueduct from the river *Colne*, to commence at a place in the parish of *Ixer* in the county of *Bucks*, and to terminate in or near the parish of *Paddington*, and to pass through or into a great number of intermediate parishes and townships for the purpose of supplying with water from the said river *Colne* not only the inhabitants of *Paddington*, and the parishes and streets adjacent, but also the inhabitants of the several intermediate parishes and townships; and that the said directors and shareholders were desirous to apply to parliament to enable the company so to do, as well as to obtain authority to raise a further sum of money for making and completing the several works which such purposes would require, and that they were also desirous to apply part of the company's funds in defraying the expenses of applying for, and obtaining an act of parliament for such several purposes, and to use the company's name and seal for obtaining such act.

The bill went on to state the different proceedings which had been taken by the company, in and subsequently to the month of *November* 1830, for the purpose of prosecuting an application to parliament for the necessary powers to carry their proposed plan into execution; and it set forth the notices which had been issued to the proprietors previously to the holding of the several meetings at which the proposed plan was taken into consideration. It then stated, that several shareholders who attended such meetings strongly opposed

posed the adoption of the plan, but that their opposition having been over-ruled, resolutions were passed, empowering the directors to apply to parliament in the present session for an act to amend and enlarge the powers of the company, and to enable the company to form and maintain an aqueduct from the river *Colne* to *London*, and to constitute the company a corporation for taking and distributing the waters of that river; and further authorising the directors to enter into such contracts as they might deem expedient for the purchase of property on the river *Colne*, or in the line of the intended aqueduct. The bill then stated, that a draft of the proposed act, which was to effect these objects, had been submitted to the shareholders and been approved by them, and a resolution passed that it should be presented to parliament.

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The bill charged that the Defendants intended to proceed forthwith to carry into effect the aforesaid resolutions, and to present and prosecute a petition to parliament under their common seal for an act authorising them to make a new cut or aqueduct from the river *Colne*, and also to expend the funds of the company, and to employ their officers, influence, and credit in support of the application, and in entering into contracts, as well as in completing other contracts which they had already made under the authority of the aforesaid resolutions. It further charged, that it would be contrary to the provisions of the now subsisting acts of parliament, and injurious to the interests of the Plaintiff and the shareholders of the company at large, that such purposes should be carried into effect, or that an act of parliament should be obtained with that view; and it charged that a considerable diminution in the value of the company's shares had already taken place in consequence of these proceedings.

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The bill prayed that the Defendants, the Grand Junction Water Works Company, might be restrained by injunction from presenting any petition or making any application to parliament, and from taking any other proceedings for obtaining an act to enable them to make any cut or aqueduct from the river *Culne*, for the purpose of supplying with water either the metropolis or the inhabitants of the parish of *Paddington*, or of any other parishes, hamlets, or townships whatsoever, or any company of proprietors already, or hereafter to be authorised to supply such parishes or places with water, or to enable the said company to construct any reservoirs or other works for the purposes aforesaid, or to raise any sum of money for making and completing such works; and that they might, in like manner, be restrained from using the seal, name, funds, property, credit, or officers of the company, in or towards the making such cut or aqueduct, or the constructing of such works, or in support of any petition to or bill in parliament for the purposes aforesaid, or from employing them, or permitting them to be employed in any manner repugnant to the now subsisting provisions of the said acts of parliament, or the purposes for which the company was now established.

The material allegations in the bill were verified by affidavit.


The Vice-Chancellor having, upon argument, made an order for a special injunction in the terms of the prayer of the bill, the Defendants now moved for the discharge of that order.


The Solicitor-General (Sir *W. Horne*), Mr. *Pepys*, and Mr. *W. Russell*, in support of the motion.

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The first branch of the injunction cannot be supported, inasmuch as it amounts, in substance, to a positive prohibition against parliament entertaining the proposed application. Every question raised by the present motion might be fairly and satisfactorily discussed and determined in a committee of the House of Commons. A collision between two courts of judicature, and, *a fortiori*, a collision with the legislature, is always to be deprecated and avoided. That part of the injunction has no reference whatever to the employment of the partnership funds, and nothing is to be done by the application to parliament which can, in any way, make the Plaintiff personally responsible. The Plaintiff's conduct is merely vexatious, and is probably resorted to for the purpose of extorting money, or inducing the company to get rid of his opposition by purchasing up his interest at an extravagant price. His language to the company is this; "Under your present constitution you have no right to execute the projected extension of your works; and yet you shall not go to parliament to obtain such an alteration in your constitution as may authorise you to undertake it." If a single shareholder is to be permitted to stop the proceedings taken by the general body of proprietors constituting a public company of this description, with a view to adapt their powers and establishment to the altered wants and condition of the times, a licence will be given to the most wanton and intolerable oppression.

The second part of the injunction touches the question of partnership property in a novel and extraordinary way, for it restrains the company from employing their common seal, name, funds, and officers in procuring any additional powers from the legislature. Now it is notorious that no public company incorporated by

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by act of parliament obtains at once all the powers and authorities which it requires ; and in the case of this very company, four successive acts of parliament have been solicited and obtained, some of which very materially altered the character and powers of its original constitution. The drawing from the river *Thames* at *Chelsea* the supply of water which, at an earlier period, had been drawn from the Grand Junction Canal, and in that way incidentally from the *Colne*, was only directed by the 59 G. 3., and was, therefore, a great departure from the undertaking as at first established; yet no one ever imagined that the company, in applying for the legislative sanction by which that change was introduced, committed a fraud upon its members, or sought unconscientiously and improperly to violate its original constitution. The substantial object for which the company was incorporated was to supply a certain district of the metropolis with water ; and whether that object is attained from one source or another is merely an accidental circumstance, to be determined by considerations of convenience, of which the company, acting upon the resolutions of its members at assemblies regularly convened, is the best, and, by its constitution, the sole judge. The authorities necessary for carrying those resolutions into effect, wherever they involve any change in the machinery of the undertaking, can only be obtained from parliament ; and a parliamentary committee is the only competent tribunal to which all the arguments against the proposed innovation, derived from its inexpediency, its alleged expense and unprofitableness, and even its inconsistency with the charter, and the breach of faith which it is said to involve on the part of the company, can be properly and effectually addressed. The Court of Chancery, therefore, so far from being called upon to interpose, is bound to stand aloof,

aloof, and leave the measure to take its regular and constitutional course; *Mayor of Lynn v. Pemberton*. (a) In *Natusch v. Irving* (b), which will be cited on the other side, the company was a mere private partnership, not incorporated, and in which the partnership deed contained no clause such as exists in this case, rendering the resolutions of the majority of the shareholders, when formally convened for the purpose, binding on the minority.

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Sir E. Sugden, Mr. Knight, and Mr. Girdlestone, jun. in support of the injunction.

It is ridiculous to represent this injunction as an attempt to encroach on the privileges or to interfere with the jurisdiction and authority of parliament. The order does not pretend to stay any proceedings of the legislature; it operates on the Defendants merely as parties in this suit, and it depends upon the well established principle according to which any partner who misapplies or perverts the partnership property and credit to his own private purposes, is liable in equity to be restrained. Here the purposes of the act of parliament which the influence and funds of the company are to be employed in soliciting is totally dissimilar, or it may be diametrically opposed to the purposes for which the company was instituted and incorporated. Under the subsisting acts, the Grand Junction Water Works Company is an undertaking for supplying *Paddington* and the parts adjacent with water taken from the river *Thames* at *Chelsea*; whereas it is now proposed to convert it into a scheme for constructing and maintaining an aqueduct from the river *Colne*, a distance of twelve or fifteen miles, and supplying

(a) 1 *Swan*. 244.

(b) *Gow on Partnersp.* App. No. 6. 3d ed.

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plying all the intermediate country as well as the north-west extremity of the capital with water conveyed along that aqueduct. As incidental to the plan, the company are to become the proprietors of corn-mills and paper-mills, and rights of fishing, and to make purchases of lands and buildings, upon which a large portion of their capital must of course be sunk.

Suppose, instead of water works, this had been a canal, and the project was, as in a case very recently before the Vice-Chancellor *, to drain off the water and lay

* For the following note of the case alluded to, the reporters are indebted to Mr. *Booth*.

1831.
Feb. 10.

CUNLIFF v. The MANCHESTER and BOLTON Canal
Company.

THE bill was filed by the Plaintiff (a shareholder suing only on his own behalf) against the company, which was incorporated by a local act of parliament, to restrain the company by injunction from affixing the corporate seal to a petition to parliament for an act to convert a portion of the canal into a railway, and from applying any of the corporate funds to the proposed object.

company rejected the offer, and contended that there was no equity for such relief as the bill prayed. His Honor, however, expressed a different opinion, and granted the injunction.

Mr. *Knight* and Mr. *Duchworth*, for the Plaintiff.

Sir *C. Wetherell* and Mr. *Booth*, for the Defendants.

The Vice-Chancellor offered to give the Defendants time to answer the affidavits, on condition that they would take no steps in the meantime. The counsel for the

The company had not time to appeal without running the hazard of losing the parliamentary session, and they therefore came to a compromise with the Plaintiff,

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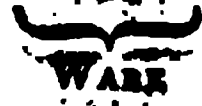
lay a rail-road along the bottom, so as to convert the canal into a railway for the conveyance of goods and passengers in steam-carriages, will it be maintained that such an alteration would be legitimate and proper, or that all the shareholders would be bound to acquiesce in it when sanctioned by the votes of a majority? His Honor was of a different opinion, and at once granted an injunction. That, it will be said, was a strong case; but where is the line to be drawn? Where are such projects to end, or how are the hapless shareholders who are entangled in them by their more adventurous or speculating partners to escape from the serious responsibility which may thus be entailed on them? The Plaintiff has purchased shares relying on the faith of this being a company having a certain definite purpose and constitution established and prescribed by acts of parliament; and he now finds that the whole of the corporate influence, credit, and resources of the company are to be employed in procuring the sanction of the legislature to a fundamental change in that purpose and constitution. Against such an application so supported, what chance has a solitary shareholder of waging in parliament a successful opposition? And even if he succeeds there, to what quarter is he to look for indemnity either against the expenses which he must himself incur in the struggle, or against the depreciation which the heavy costs of a contest in parliament

tiff, who thereupon abandoned the suit.

A few days afterwards a bill was filed by one *Maudsley* against the same company, and for a similar object.

The Defendants filed a demurrer, which the Vice-Chancellor over-ruled. The company then put in an answer, and the cause was subsequently heard on the merits, and the suit dismissed with costs.

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parliament must of necessity occasion in the value of his shares?

The arguments drawn from the expensive nature and doubtful utility of the proposed scheme, as well as from the breach of faith which it involves towards persons holding substantial interests in the company as now constituted, may all, it is said, be urged with equal effect before a parliamentary committee; but they cannot be submitted to that tribunal at the same comparatively moderate cost, and with the same certainty of receiving a patient and impartial consideration, or a prompt and final decision, as in this Court. Undoubtedly a parliamentary committee may entertain and act upon considerations of this description; but that is no reason for depriving the Court of Chancery of its concurrent jurisdiction, especially as the latter court has first obtained possession of the subject, and is besides much better fitted to investigate and determine questions of so delicate and complicated a nature. If this were the case of a private partnership in which some of the partners were applying for an act of parliament to extend or vary the powers of the company under their deed of partnership, the Court would at once interpose on the ground of the flagrant breach of faith which they were committing against the dissenting partner; and the circumstance that this is a joint stock company, the constitution of which has been solemnly settled by acts of parliament, rather strengthens than weakens the ground for interposition. That was the deliberate opinion of Lord Eldon in the case of *Natusch v. Irving*, which is a strong authority for the present injunction, and is perfectly reconcileable with the doctrines laid down by the same Judge in the subsequent case of *Mayor of Lynn v. Penberton*.

The

The LORD CHANCELLOR.

This injunction consists of two branches which are manifestly and widely distinguishable; the one overriding and embracing the whole of the introductory and concluding portion of the order; the other, being the part which lies between them, and being of comparatively small importance. The first branch refers exclusively to the steps which may be taken by the company with a view to obtain a new act of parliament authorising the proposed alterations in their undertaking; the second merely restrains them from proceeding to carry those alterations into execution, independently of such legislative sanction, or from using, or permitting to be used, the seal, name, funds, credit, and officers of the company with a view to effect any such purpose under their existing constitution.

I am glad that the subject, which is one of great importance, has been fully discussed. The opinion I have formed is against the injunction as far as regards the first and last parts of the order; but as far as regards the intermediate portion, I shall permit it to stand.

It is quite idle to represent this, as was at first sought to be done, as an attempt to restrain by injunction the proceedings of the High Court of Parliament. This is no injunction to restrain any proceedings of parliament, or to restrain any parties who may be called upon by the authority of parliament from intervening in such proceedings. It is simply an injunction to restrain a partnership now existing under a certain constitution from doing any act in its corporate capacity with a view to obtain a new modelling of that constitution, say an extension, or a variation, or even a total change of it.

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I am of opinion that the right to take proceedings in parliament in the way that is proposed is incident to a corporation of this nature; at the same time fully admitting that the shareholders are certainly not entitled to do any thing which the partnership prohibits, or which those acts of parliament, which, in truth, constitute their deed of partnership, give them no authority to do.

Although, therefore, I am now disposed to support the injunction as to all such acts as are not authorised by the present constitution of the company, I will not interfere to restrain the company, *quâ* corporate body, from applying to the legislature and obtaining a change in its constitution, which will put those acts of parliament upon a different footing, by extending its powers or by substituting a new body for the old. I can see nothing in the nature of a corporate body of this description to prevent that body from so dealing with itself, and asking for such an extension or variation of its constitution. A corporation may apply to the crown for a new charter; and the new charter, when accepted, binds the corporation and gives it a new existence. And why may not such a body as this in like manner apply to parliament for an alteration and extension of its powers? It was said that if corporate bodies of this description are allowed to make such an application, those who rely on that constitution are deceived because they come in upon the faith and footing of its being a partnership of a certain kind, and now it is sought to be materially varied. But are not a man's eyes open to the fate that attends him when he enters into a partnership with a body of this kind? Does he not know that he is liable to this contingency, and either that the company ought to have the power of obtaining an alteration in its constitution, or that he ought to come in as a member of it under certain conditions and restrictions?

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All the arguments used here touching the great change to be effected by the new project — that the change is as great as if, instead of a canal, there was to be an application to convey by steam upon a railroad — that it is likely to ruin the proprietors, and the like, — are still open to the Plaintiff before a committee of the House of Commons or House of Lords. There is not a single individual, who fancies himself aggrieved by the proceedings, who may not apply in person before that tribunal, and by his agents, counsel, and witnesses oppose the passing of the bill into a law. Is not that the old, regular, and constitutional mode, and is not this a new and an irregular mode of proceeding? If this application is listened to, every time a new act of parliament is applied for by a body, consisting, like this water company, of 600 or 700 proprietors, if a single member chooses to differ from the rest (and, indeed, but for that very difference the intervention of Parliament would, in most cases, be unnecessary) before the corporate seal can be carried to *Westminster* at the foot of a petition by the company praying for an extension of its powers, the matter must first be discussed here upon an injunction bill; and if it survives the injunction bill, then, and not till then, will it come to its proper tribunal. I, for one, am not prepared to open this door to litigation. There never was so wild a dream as to imagine that, by refusing this motion, I shall overturn a decision of Lord *Eldon's* in *Natusch v. Irving*. I am rather, in fact, affirming that decision; but if I upheld the whole of this injunction, I should be going against the principle of the case of *The Mayor of Lynn v. Pemberton*. The language of Lord *Eldon's* judgment in the latter case (a) plainly shews that he could not have done what he is represented as having done in *Natusch v. Irving*.

It

(a) 1 *Swan*. 251.

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... said that this is an attempt on the part of the company to do acts which they are not empowered to do by the acts of parliament. So far I restrain them by injunction from any conversion or application of their funds that is not authorised. But that is not what the Plaintiff now asks; for he asks me to restrain them from doing that which will make what they propose to do a lawful act.

It is urged that one partner has been restrained from accepting and indorsing bills, the produce of which is intended to be applied to what are not partnership purposes or transactions, and that the present is the converse of that case. But that argument proves a great deal too much. There the restraint is imposed upon one partner; here it is conceded the object is to restrain every one of the partners, whether they amount to one hundred or a score. Now the act of parliament will, if it is procured by any one, be binding upon the whole body, however much the others may reclaim against it. And yet it is not pretended that such an injunction could be granted to restrain one. This is sufficient to shew the wide distinction that exists between restraining the act which is here sought to be performed, and restraining an individual partner from doing acts which are contrary either to the express or implied contract of partnership.

The dealings between the parties and the whole of the objections are still open in the proper place. With the trifling exception adverted to, therefore, the injunction must be dissolved.

1831.

TUBBS v. BROADWOOD.

March 5. 9.

UNDER a will made in the year 1772, certain lands and a messuage situate at *Acton*, in the county of *Middlesex*, were limited to *Robert Tubbs* the elder for life, without impeachment of waste, with remainder to his first and other sons successively in tail, with divers remainders over. *Robert Tubbs* the elder soon afterwards entered into possession of the lands so devised to him, and continued in the possession and enjoyment of them till the month of *August* 1818, when he died, leaving the Defendants *Broadwood* and others his executors, and the Plaintiff, *Robert Tubbs* the younger, his eldest son and heir at law. On his father's decease, the Plaintiff, having become tenant in tail in possession, suffered a common recovery, and acquired the fee of the settled estate.

Where a tenant for life sells part of the settled estate under the authority of an act of parliament which directs him to lay out the consideration money in the purchase of other lands, and to settle them to the same uses, and he afterwards purchases lands in fee simple, to nearly the amount, but dies without having settled them accordingly, leaving them to descend upon his heir at law, who was also the first tenant in tail in remainder under the settlement, a court of equity will intend that the purchase was made in performance of the obligation imposed by the act, and will not permit the re-

By three several acts of parliament passed in the years 1793, 1795, and 1805, respectively, the Grand Junction Canal Company was empowered to purchase lands necessary for their navigation, upon the valuation of commissioners, or of a jury, in the manner therein mentioned, from the owners of such lands, having an estate therein not less than an estate for life; and it was further provided that the canal company should pay to such owners compensation for any damages that might be done by their acts or works to such lands; and it was directed that the amount of the purchase money of such lands, and also of such compensation, where

remainder-man to recover the value of the lands sold against the personal estate of the tenant for life.

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where compensation was awarded, should be laid out by the owners thereof in the purchase of other lands in fee-simple, which were to be settled to the same uses as the lands sold or damaged had been subject to; and that till such investment was made, the amount of such purchase money and compensation should be placed in the public funds or put out on real security, and the interest and dividends thereof be paid to the persons who for the time being would be entitled to the rents and profits of the lands so to be purchased.

In the year 1800 the canal company, under the powers conferred by the two first-mentioned acts, purchased from *Tubbs* the elder a part of the settled estate of which he was tenant for life in possession, at the price of 660*l.* 18*s.* 9*d.*, which they paid to him, taking at the same time a conveyance from him in the form prescribed by the acts. In the month of *May* 1802 the company in like manner paid to *Tubbs* the elder a sum of 186*l.* 5*s.* 8*d.* for damages done to the settled estate by the works of the navigation; and in the month of *October* 1805 they paid him a further sum of 595*l.* 14*s.* 3*d.* by way of compensation for other damage done by their works to that estate.

The bill was filed by *Robert Tubbs* the younger, alleging that on coming into possession as tenant in tail of the estate on the death of his father, he had not been able to find any lands purchased, or any sums invested on account of the aforesaid several payments made to his father by the canal company, according to the directions and provisions of the acts of parliament, and praying that he might recover the amount of the sums so paid with interest, or the value of the stock which, if duly invested, those sums would have produced,
either

either from the Defendants the canal company, or from the other Defendants the executors of his father.

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The Defendants the executors, by their answer, admitted that the several sums of 660*l.* 18*s.* 9*d.*, 186*l.* 5*s.* 8*d.*, and 595*l.* 14*s.* 3*d.* had been paid to their testator as alleged in the bill; but they stated that the first sum only had been received by him as the purchase money for the sale of land in settlement, and that of the other sums 142*l.* 17*s.* 10*d.*, or, according to another statement, 163*l.* or thereabouts were the amount of costs and expenses incurred by him in his proceedings with the canal company, and that the residue had been paid to him by way of compensation for temporary damage done to his life interest. The answer further stated that in *May* 1809 *Tubbs* the elder purchased the fee-simple of a small piece of land abutting on the settled estate, and only separated from it by a common fence, for the sum of 839*l.* 18*s.*, including therein the value of the timber, and the costs of the conveyance; that he thereupon took possession of it, and annexed it in enjoyment to his adjoining property; that he also entered into a verbal contract with certain commissioners under an inclosure act for the purchase from them, at the price of 385*l.* 16*s.* 6*d.*, of several detached plots of ground lying contiguous to the lawn of his mansion-house, and that having got possession of these plots he took down the boundaries and threw them all into his lawn, surrounding the whole with one inclosure; that the price of the latter purchase was not paid till after his death by the Defendants as his executors; and that, by virtue of a special provision in the inclosure act, the receipt which they then obtained from the commissioners for the money, amounting with the costs to 892*l.* 11*s.*, which receipt they had forthwith delivered

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to the Plaintiff, of itself without any conveyance vested the fee-simple of the land in the Plaintiff. The Defendants farther admitted that, according to the provisions of the acts of parliament, their testator was bound to lay out the first-mentioned sum of 660*l.* 18*s.* 9*d.* in the purchase of lands to be settled; but they submitted that, under the circumstances, the purchase of *May* 1809 must be intended to have been made in performance of that obligation, and that as to the other sums no such obligation existed, inasmuch as these were paid for temporary damages and costs, and not for damage done to the inheritance.

The evidence in the cause having established the case made by the executors in their answer, his Honour the Vice-Chancellor, at the hearing, dismissed the bill with costs as against the Grand Junction Canal Company, and without costs as against the executors.

The Plaintiff now appealed against his Honour's decree, so far as it dismissed the bill against the executors.

Mr. *Temple*, for the Plaintiff, contended that, inasmuch as it was admitted that 1440*l.* or thereabouts had been received by the tenant for life, while no more than 1232*l.* (even giving to his estate the benefit of the second purchase, contrary to the defence set up by the answer) had been laid out by him in land, it was impossible to intend that his purchases were made in performance or part performance of the obligation which the acts of parliament imposed; more especially as the purchase from the commissioners had not been completed till after his decease. The evidence indeed attempted to shew that a sum greater than the whole of the money received from the canal company as the price

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Barnwood.

price of the property in settlement had been afterwards expended by the tenant for life in buying other lands, which he had allowed to descend upon the Plaintiff; but the sum which was alleged to have been paid him for damages was not proved to have been paid in respect of what was termed temporary damage, — a distinction not noticed in the acts of parliament; and even if what appeared to have been the amount of his costs were deducted from the total, there would still remain a sum of £55. unaccounted for, clearly shewing that, as far as the testator's intention was to be regarded, he made those several purchases entirely without reference to any supposed obligation on his part. The doctrine of implied satisfaction or performance, besides, had never been extended to a case where the duty was imposed, not by the covenant of the party himself, but by the provisions of an act of parliament. *Tubbs* the elder stood in the situation of a wrongful possessor rather than a covenantor; and whatever might be the moral duty of making restitution, as the obligation was neither a legal nor an equitable one, the Court would not presume an intention to discharge it. If he had meant the purchase to be a performance of the statutory provision, he would have directed the newly purchased lands to be conveyed to the uses of the settlement, or have invested the produce of the sales and the compensation money in the funds; but he had done neither. Suppose the heir at law and tenant in tail had been different persons, and the tenant for life had died leaving specialty creditors, would this Court have restrained such creditors from proceeding against the purchased lands, and interfered for the benefit of the tenant in tail? At any rate the Plaintiff was entitled to an inquiry as to the difference between the amount of money received, and of the money laid out.

Mr.

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Mr. *Tinney* and Mr. *Merivale*, *contra*, relied upon the cases of *Lechmere v. Lechmere* (a), *Sowden v. Sowden* (b), and *Denton v. Davies* (c), especially the two former, as entirely disposing of the Plaintiff's claim; and they contended that the principle of the doctrine of performance equally applied whether the obligation was imposed by the specific covenant of the party, or by his entering into a contract of which the obligation was made an express term by the provisions of an act of parliament. Conceding, for the argument's sake (although the evidence by no means required the concession), that the sum paid for damages, as well as that received for the property sold, ought to have been laid out in another purchase, the amount of the costs was still to be deducted from the total; and then the difference between the amount of the testator's receipts and outlay became so trifling (upon the Plaintiff's own statement not more than 65*l.*), that the Court would presume that the discrepancy arose from surface damages or costs which had not been taken into the account, and would not, after the lapse of so many years, permit any inquiry to be gone into on the subject.

Mr. *Temple*, in reply.

The LORD CHANCELLOR.

I have heard nothing to shake the opinion which I formed when I heard the case opened, and, therefore, I have not called upon the Defendants' counsel to go at large into the question arising upon the point of law. It may be true, as has been strongly pressed by
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(a) *Cas. T. T.* 80. 3 *P. Wms.*
211.

(b) 1 *Bro. C. C.* 582. 1 *Cas.*
165.

(c) 18 *Ves.* 499.

1851.

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the Plaintiff's counsel, that this is the first time in which the doctrine of *Lechmere v. Lechmere* (a) has been carried beyond the case of covenant; but the principle of that case is directly applicable to the present. The whole doctrine proceeds upon the ground that a person is to be presumed to do that which he is bound to do; and if he has done any thing, that he has done it in pursuance of his obligation. In this case an act of parliament calls upon the tenant for life to invest in real estate, or in the funds, for the benefit of the next in remainder, all sums which he shall receive for lands sold under the provisions of the act. Here the tenant for life first received 660*l.* and afterwards laid out 839*l.* 18*s.*, including therein the price of the timber, in the purchase of other lands lying in the immediate neighbourhood, of easy, convenient, and profitable occupation with the lands still remaining in settlement; and it is a circumstance which may fairly be said to strengthen the presumption on which the doctrine rests, that the newly acquired land is valuable and useful with a view to the enjoyment of the other property comprised in the settlement. The tenant for life subsequently contracted for a second purchase, to the amount of 392*l.* 11*s.*, making an aggregate sum of 1232*l.* 9*s.* laid out. Can it be denied that, strictly upon the principle of that doctrine, this act must be taken to have been done by the tenant for life, with reference to his obligation? What does it signify whether the obligation arises out of a covenant, or under the provisions of a statute? Even taking this as a private act of parliament, still that comes within the description of a conveyance; and if a person is bound by his conveyance, is not this as good an obligation as a covenant inserted in the instrument would have been? But if a man is bound by his conveyance, is it not equally

(a) *Cas. T. T.* 80. 3 *P. Wms.* 211.

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equally obligatory upon him to do that which is parcel of his conveyance, as to perform his covenant? If a person by the provisions of an act of parliament disposes of lands, and by the condition under which he receives the price is bound to lay out the money in other lands to be settled to the same uses, the presumption is, that what he did in laying out that money was done with reference to his pre-existing obligation :

Upon the other question respecting the damages, if the sum of 168*l.* charged for expenses be deducted, there remains a balance of 618*l.*, and allowing, what upon the evidence is not very likely, that the whole of the balance was paid for permanent damage done to the inheritance, that would leave a total of 1278*l.* to be laid out by the tenant for life. Now it is admitted that he has laid out 1232*l.*, leaving a difference of only 56*l.* unaccounted for ; and am I to assume, upon this trifling discrepancy, that this is incorrect, and by sending the matter to inquiry substantially to reverse the judgment? I have no doubt whatever that this small sum may have been temporary damage; and I will not, therefore, on this point reverse the decree, and send it to the Master, merely for the purpose of ascertaining whether this sum of 56*l.* was or was not compensation paid for the amount of temporary damage.

Appeal dismissed without costs.

1831.

DEVAYNES v. NOBLE.

BARING v. NOBLE.

1831.

March 2. 8, 9.

WILLIAM DEVAYNES was, at the time of his death, which happened in *November* 1809, a partner in the banking house of *Devaynes, Dawes, Noble, and Co. of London*, in which *Devaynes* himself, *Dawes, Noble, Croft*, and *Barwick* were the individual partners. After his decease the concern was carried on by the surviving partners under the same firm, but on their own proper account, the estate of *Devaynes* having no longer any interest therein; and they continued to conduct it till the 30th of *July* 1810, when a joint commission of bankrupt was issued against them.

The creditor of a partnership, in which one of the partners dies, and the surviving partners afterwards become bankrupt, has a right to resort to the assets of the deceased partner for payment, without regard to the state of the account as between such deceased partner and the surviving partners.

The first bill, which was filed soon after the bankruptcy against the executors and devisees in trust of *Devaynes's* will, and against the assignees of his former partners, sought to have the accounts taken of the testator's estate, and the trusts of his will executed. The second was a creditor's bill, filed by two persons (*Sir T. Baring* and *Sir F. Standish*), who had been creditors of the banking house at the time of *Devaynes's* death, and whose debts had not been satisfied or extinguished by the effect of any subsequent dealings with the new firm carried on by the surviving partners. It was filed against the personal representatives and devisees in trust of *Devaynes's* will, the persons beneficially entitled under that will, and the assignees of his bankrupt partners; and its main object was to establish the full amount of the Plaintiffs' demands against the real and personal estate of *Devaynes*, which was a solvent estate, leaving

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v.
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leaving *Devaynes's* personal representatives to their remedies over against the estates of his surviving partners upon the winding up of the partnership accounts.

The substantial question raised in the second suit was, whether the creditor of a partnership in which one of the partners subsequently died, and the surviving partners had afterwards become bankrupt, had an absolute and unconditional right to resort at once, for payment of his debt, to the assets of the deceased partner.

By the decree made on the original hearing by Sir *W. Grant* in both causes, the Master was directed in the second suit to take an account of what was due at the death of *William Devaynes* deceased, from the partnership of *Devaynes, Dawes, Noble, Croft, and Barwick* to the Plaintiffs, and all such other persons as were creditors of the partnership at the time of the death of *Devaynes*, and also of what was due, at the time of making the decree, from the partnership to such creditors, and to inquire whether such creditors or any and which of them continued to deal with the surviving partners after the death of *Devaynes*, and what sums of money were paid by the surviving partners to such creditors respectively from the death of *Devaynes* to the bankruptcy, and what had since been received by them respectively; and also whether such creditors, or any and which of them, had by such subsequent dealings released the estate of *Devaynes* from the payment of their respective debts, or what (if any thing) remained due in respect thereof.

The particular nature of the debts claimed by the different classes of creditors who came in and sought the benefit of this decree was particularly specified and distinguished in the Master's report. The claim of the
Plaintiff

Plaintiff *Baring*, and the circumstances out of which it arose, are fully stated by Mr. *Merivale* in his report of *Baring's case*. (a) That of his co-plaintiff *Standish*, in its general nature and circumstances, fell within that class of debts ranged by the Master's report under the description of *Clayton's case*. (b)

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The main question raised by the second suit, together with many subordinate points, was afterwards elaborately argued at the Rolls before Sir *W. Grant* upon exceptions to the Master's report (c), when his Honour adhered to the principle of his first decree, and in effect decided that a partnership contract is, upon the death of a partner, to be considered as joint and several, and that where the surviving partners are insolvent, a creditor has a right to resort to the estate of the deceased partner, without regard to the state of the accounts as between him and the surviving partners. (d)

Two separate petitions of appeal, by parties interested in Mr. *Devaynes's* estate, were presented against the whole of the original decree, and against the several consequential orders by which the effect of it was to be worked out. The appeals were thrice argued; first before Lord *Eldon*, again in *December* 1829 before Lord *Lyndhurst*, both of whom resigned the Great Seal without delivering judgment, and now, for the third time, before Lord *Brougham*.

Mr. *Knight* and Mr. *Purvis*, Sir *E. Sugden* and Mr. *Koe*, for different parties interested in supporting the decree.

No

(a) 1 *Mer.* 611.

(b) 1 *Mer.* 572.

(c) 1 *Mer.* 530.

(d) See in particular *Sleech's case*, 1 *Mer.* 539.

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No doubt can be entertained, that the continuing partners of the firm were insolvent, for the joint commission of bankruptcy is *prima facie* evidence of their insolvency, and throws upon the party who disputes it the burthen of proving the contrary. Insolvency in law is the best proof of insolvency in fact, and so it was considered by the eminent judge who pronounced this decree. The fact, however, is really immaterial. The Plaintiffs' debts, being debts due from the partnership as originally constituted, are joint and several debts of all the partners; and although where debtors are severally bound to an individual for the same debt, the presumption is, that before the creditor proceeds against the estate of one who is deceased, he will first exhaust the estates of the survivors whom he can reach by action, this is not essential as a preliminary step; he is at full liberty, at his own discretion, to go against any one of them for the whole. That would be his right at law; for the accidental circumstance that one of them is dead, which compels him to seek his remedy against that one in equity, cannot alter the nature of his rights; and this Court enables him to work out those rights, by its own peculiar machinery, against the assets of his deceased debtor, as effectually as a court of law would have done had the debtor been alive. This doctrine is strongly illustrated by the conduct of courts of equity in the case of bonds upon which, either from a defect in form, or from the death of some of several co-obligors, the obligee is unable fully to enforce his demand at law. In such cases the rule is well settled, that wherever the consideration given for the bond has been paid to all the obligors, in other words, where the benefit has been shared by them all, the obligee shall be at liberty to proceed at his discretion against the separate estates of each; nor is he required to shew that he has previously resorted to and exhausted his legal remedies.

This

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This doctrine, which is founded in common sense and justice, resting as it does on the principle of effectuating the real interest of the contracting parties, was recognised at a very early period, and has been uniformly followed and approved; *Lane v. Williams* (a), *Bishop v. Church* (b), *Thomas v. Frazer* (c), *Burn v. Burn*. (d)

Precisely the same rule applies, and for the same reason, to the case of partners with respect to the partnership debts. At law, it is true, partners who die get rid of their partnership liabilities; but in equity those liabilities are considered as several and subsisting, and they may, therefore, be enforced upon a bill against the representatives. A court of equity holds it to be unjust that the estate of a partner who has had the benefit of a joint contract, should, by the accident of his death, be released from the obligation which formed a part of the consideration given to the other contracting party. This principle, applied by the Lord Keeper in *Holstcomb v. Rivers* (e), and by Lord Hardwicke in *West v. Ship* (g), (a case which approaches very closely to the present,) has been repeatedly recognized and sanctioned by Lord Rosslyn and Lord Eldon; *Daniel v. Cross* (h), *Stephenson v. Chiswell* (i), *Gray v. Chiswell* (k), *Ex parte Kendall*. (l) In the case last referred to, the language of Lord Eldon is clear and express. The same great Judge has, on several subsequent occasions, distinctly sanctioned the doctrine upon which the decision under appeal is founded; *Vulliamy v. Noble* (m), *Cowell v. Sikes*

(a) 2 Vern. 277. 292.

(b) 2 Ves. sen. 100. 371.

(c) 3 Ves. 599.

(d) Ibid. 573.

(e) 1 Ch. Ca. 127.

(g) 1 Ves. sen. 239. S. C.

sen. *Skipp v. Harwood*, 2 Swans. 586.

(h) 3 Ves. 277.

(i) Ibid. 566.

(k) 9 Ves. 118.

(l) 17 Ves. 514.

(m) 3 Me. 593.

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Sikes (a) : and Sir *W. Grant* himself, who is erroneously supposed to have made this decree without much consideration or argument, deliberately re-stated and followed out the principle, not only in the later stage of *Devaynes v. Noble* itself, upon the hearing of the exceptions, but also in his able judgment in *Sumner v. Powell* (b). The decree, therefore, now sought to be reversed, is equally supported by principle and authority; and the only case, *Hoare v. Contencin* (c), which seems to be inconsistent with it, if it be anything more than a *dictum*, cannot now be considered as law.

Sir *C. Wetherell* and Mr. *Treslove*, Mr. *Spence* and Mr. *Cockerell*, Mr. *Pepys* and Mr. *Follett*, for different parties who appealed.

The cases in which joint liabilities have been construed as if they were joint and several, such as *Bishop v. Church*, *Burn v. Burn*, and *Thomas v. Frazer* have no application. The relief administered in such cases is grounded simply on mistake, the intention having been to constitute a legal demand originally both against the deceased person and the survivor, and the Court only giving effect to what was the real intention of the parties, as it would have done upon a bill to correct the form of the security had the deceased party been alive. But where such an intention did not exist, or where there was no joint liability antecedently, the Court will not interfere to give the creditor a remedy for which he has not contracted, and which the nature of the transaction proves that neither party had in contemplation : *Sumner v. Powell*. (d)

The


(a) 2 *Russ.* 191.

(b) 2 *Mer.* 30.

(c) 1 *Bro. C. C.* 27.

(d) 2 *Mer.* 30. and *Turn. & Russ.* 425.

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The decree under appeal differs from all those which have been relied upon as precedents in this very material circumstance, that it at once declares the liability of Mr. *Devaynes*' estate to the whole amount of the Plaintiff's claim, without its being proved or declared that the assets of the surviving partners are insufficient, and without having the extent of the deficiency ascertained. In that respect it goes far beyond *Daniel v. Cross* (a), the case in which the principle is supposed to have been first asserted; for it appears on examining the registrar's book that, in *Daniel v. Cross*, the Plaintiffs had previously gone in and proved their debts, under the commission, against the estate of the surviving partners; but that inasmuch as that estate would not be sufficient to pay them in full, they claimed by their bill to receive the balance out of the assets of the deceased partner. *Daniel v. Cross* therefore really decided nothing more than the earlier cases, which had long before established the liability in equity of a deceased partner's estate to discharge the partnership debts, in the event of the creditor having lost or exhausted his remedy against the estate of the surviving partner, upon whom the joint assets and obligations devolved at law. But before that equity can be set up, it is necessary to shew, as a previous condition, that recourse has been had without effect to the party who is the legal debtor; and, accordingly, in all the cases that have been referred to, not excepting *Daniel v. Cross*, that distinction will be found to have existed. In *Holstcomb v. Rivers* (b), the earliest case upon the subject, all that was actually determined was that the surviving partner should account, the executors of the deceased factor, his copartner, not having been made parties to the suit. In *Lane v. Williams* (c), it appears from the registrar's book

(a) 3 Ves. 277.

(b) 1 Ch. Ca. 127.

(c) 2 Vern. 292.

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book that *Newberry*, the partner by whom the note was given, and who had survived his copartner, and was liable at law to pay the debt, had absconded, and was in contempt to a sequestration. The case therefore only decided that where the debtor has exhausted his remedies against the surviving partner, he may then, but not till then, go against the representative of the deceased partner. In *West v. Skip* (a), the surviving partner is treated as a trustee, so far as the interests of the deceased partner are concerned; liable in the first instance to pay the joint debts, and entitled, should the joint assets prove deficient, to be relieved out of the assets of the deceased partner. It is only where the survivor is compelled to pay more than his proportion, that he has any equity to come upon the estate of his deceased partner for relief. The same view of the relative situation of deceased and surviving partners, in reference to the administration of assets, is taken in *Jacomb v. Harwood* (b), *Hankey v. Garratt* (c), and *Ex parte Williams* (d). In *Ex parte Williams*, Lord Eldon seems to have considered that it is only through the operation of administering the equities as between the partners themselves, that the joint creditors, in the case of a partner who dies, have an opportunity of making their claims effectual against his estate. The observations of Lord Eldon, in *Gray v. Chiswell* (e), are also strongly applicable to the present question. That was the case of a claim made in a suit for the administration of *Chiswell's* estate after his decease by certain of the joint creditors of *Chiswell* and *Nantes*, who had proved their debts under a commission against *Nantes* the surviving partner. Lord Eldon there said, speaking of those creditors,

(a) 1 Ves. sen. 259.

(b) 2 Ves. sen. 265.

(c) 1 Ves. jun. 256.

(d) 11 Ves. 5.

(e) 9 Ves. 118.

tors, — “They have had their demand effectuated against the joint estate surviving; and now contend, that by the accident of the death, they shall be, not only upon an equal, but upon a better footing, as against the separate creditors, than if the party had lived, and had become a bankrupt. It would be extraordinary to say that.” It is clear from this passage in his judgment, that Lord *Eldon* never conceived that joint creditors could have a right to resort to the estate of a deceased partner until they had done every thing in their power to make good their demands against the joint estate, and that even then their demands against the separate estate of the deceased partner must be postponed to the separate debts of that partner. Even in *Ex parte Kendall* (a), which was a petition in the bankruptcy of this very partnership, and in which Lord *Eldon* seems to have recognised the right of the joint creditor in certain circumstances to resort to the assets of the deceased debtor, he speaks of the equity in terms of great doubt and surprise, as Lord *Thurlow* had previously done in *Hoare v. Contencin* (b); and, putting the case of an application by a creditor of the five original partners (the very case which this bill seeks to establish), he expressly says, “the answer to that application might be, admitting his right, that he should first go in and prove against the estates of the four.” (c) It is clear, therefore, from the language of Lord *Eldon* both in *Gray v. Chiswell* and in *Ex parte Kendall*, that the mere circumstance of the bankruptcy of the surviving partners, did not, in his opinion, relieve the joint creditor from the obligation of seeking his remedy in the first place against those who were his debtors at law. In *Vulliamy v. Noble* (d), another case arising out of the liabilities of this same part-

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(a) 17 *Ves.* 514.

(b) 1 *Bro. C. C.* 27.

(c) 17 *Ves.* 521.; and see p. 525, 526.

(d) 3 *Mer.* 593.

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partnership, the decree was that, subject to the set-off, the debt should be proved against the estate of the bankrupts, and that the amount of the deficiency only should be charged upon the estate of *Devaynes*. The decision, in *Cowell v. Sikes* (a), proceeded upon the fact of a clear deficiency of assets, it being distinctly proved that there were no joint assets to answer the demand. All these cases shew that, even if the equity exists, which upon the authorities it is submitted is extremely questionable, the equity is of a secondary kind, and cannot arise or be made available until the joint estate of the surviving partners has been resorted to and exhausted; and then only to the extent of the deficiency: whereas the decree of Sir *W. Grant* in the present case, assumes the right of the Plaintiffs to pass by the assets of the surviving debtors, and go at once for their whole demand against the estate of the deceased partner, without any previous investigation or accounts, and without its being shewn that the Plaintiffs have been unable to obtain payment of any part of it out of the joint estate. That certainly cannot be right; and Lord *Eldon* intimated as much when the appeal was before him, although he was not able, before he quitted office, to make up his mind as to the proper mode in which the decree should be remodelled. The Defendants, putting their case at the lowest, are at all events entitled to an inquiry into the state of the assets of the five partners at the time of Mr. *Devaynes*' death.

Mr. *Knight*, in reply.

The LORD CHANCELLOR.

This case has been very fully argued. I shall not enter at length into the matters which it involves, or do
more

(a) 2 *Russ.* 191.

more now than advert to one or two points, as to the doctrine of courts of equity, and as to the equity upon which the cases on this subject rest.

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There may have been considerable doubts in the minds of Lord *Thurlow* and Lord *Eldon*, touching the origin of this equity; and, perhaps it would not be going too far to say, that taking what has been said by those learned Lords, the one in *Hoare v. Contencin* (a), and the other in *Ex parte Kendall* (b), a suspicion may arise that if they had been sitting here originally, when the earliest of the cases was decided, they might not have laid the foundation of the rule that has since prevailed. That is certainly possible. But it is perfectly clear that they themselves admit the existence of the doctrine; and that one of them at least, Lord *Eldon*, has acted upon it; for it was justly observed by the very learned Judge before whom this case first came, and who gave great attention to it, upon a full review of all the cases, and with a distinct reference to what Lord *Eldon* had previously said in *Ex parte Kendall*, that although Lord *Eldon*, in *Ex parte Kendall*, expressed some surprise at the introduction of this equity, yet he did not intimate a doubt of its existence, and that he had indeed acted upon it in *Gray v. Chiswell*. (c) To which Sir *William Grant* might have added, that even in the case of *Ex parte Kendall* itself, where his Lordship is supposed to have doubted the propriety of the rule, and where he certainly expresses his ignorance as to its origin, he nevertheless fully recognised it. That Lord *Hardwicke* fully recognised the doctrine, and took that distinction between mercantile transactions and other contracts, which was afterwards referred

(a) 1 Bro. C. C. 27.

(c) 9 Ves. 113.

(b) 17 Ves. 514.

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referred to and adopted by Sir *W. Grant*, appears clear from the case of *Bishop v. Church*. (a)

It is not upon slight grounds, certainly, that any Court, either of law or of equity, ought to loosen and unsettle that which has stood for so long a period as nineteen years. If it be true that even a prevailing error, — what has been called a common or universal error, — may be said to make the law, this at least may be allowed to be a sound foundation of the doctrine I am referring to, namely, that, unless a great and manifest deviation from principle shall have been committed, it may create much further mischief to reverse an individual case by way of correcting a slight error, if that error has been acted upon for a long series of years, than to leave it as it stands; more especially, if the opinion of lawyers and the decisions of judges have been ruled by it, and if upon the analogies of that case, the same principle has been recognised and adopted in other cases connected with and relating to it.

Now in this case I should feel myself under the pressure of these considerations; but I am relieved from all doubt, when I find that the same principle, which was acted upon by Lord *Eldon*, has been already pursued and followed up in a case not now called in question. For *Sumner v. Powell* (b) was as nearly as possible the principal case, or rather it was a decision the other way, upon circumstances the converse of the present. In that case there was an obligation constituted by covenant, and it was held that the whole liability arose out of that covenant, and was to be extended no further. That being a case, then, the converse of the present, it may be referred to as touching upon the principle here. Besides,

(a) 2 *1 es. Sen.* 371.

(b) 2 *Mer.* 50.

es, the Master of the Rolls there distinctly recognised
the doctrine now sought to be impeached, and he ex-
pressly referred to this case of *Devaynes v. Noble*, in a
y'to shew that when it was before him, it had not been
htly dealt with by his Honor, but had been decided
on mature deliberation, and after a full examination
all the authorities.

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Decree affirmed. (a)

(a) See *Wilkinson v. Henderson*, 1 *Mylne & Keen*, 582.

MARTIN v. MARTIN.

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March 11.

BELL v. MARTIN.

THE Plaintiff *Maria Elizabeth Alleyne Martin*, was
entitled to considerable personal estate, and to the fee
ple of a moiety of a plantation in the colony of *Deme-*
a, called *New Orange Nassau*, and also, in the event
her attaining twenty-one, and of her brother dying
ler that age, to the fee simple of the other moiety of the
ie plantation. She and her brother being both infants,
nit in their names, for the protection of their persons
fortunes, was instituted by their next friend in the
art of Chancery in *England* against all proper parties :
ding that suit, the female Plaintiff, before she or her
brother

After the mar-
riage of a
female ward a
settlement is
made, under
the direction
of the Court,
for the benefit
of the wife
and children
of the mar-
riage, of a
moiety of a
plantation in
Demerara, of
which the wife
was seized in
fee at the time
of the mar-

; the husband and wife afterwards mortgage the estate to persons having full
ce of the settlement; by the law of *Demerara* the settlement was a nullity,
in no manner affected the rights and powers of the husband and wife over the
e: — Held, that the mortgage is valid, inasmuch as the equity of the wife and
ren attaches only upon the person of the husband, and not upon the estate.

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brother attained the age of twenty-one years, intermarried, without the consent of the Court, with the Defendant *Anthony Crosbie Martin*: and an order was made in the cause, referring it to Mr. *Popham*, then one of the Masters of the Court, to approve of a proper settlement of her real and personal estate upon her and her children. In pursuance of that order an indenture of settlement, dated the 27th day of *August* 1802, and made between *Anthony Crosbie Martin* and his wife of the one part and *John Longden* and *David Milne* of the other part, was approved of by the master, and duly executed. By this settlement *Anthony Crosbie Martin*, in consideration of the marriage, bargained, sold, and assigned unto *John Longden* and *David Milne*, their executors, administrators, and assigns, all those the personal estate and effects therein described of *Maria Elizabeth Alleyne Martin*, and all right, title, claim and demand, both at law and in equity, of him *Anthony Crosbie Martin*, of, in, to, and out of the same and every part thereof, to hold and enjoy the same unto and by *John Longden* and *David Milne*, their executors, administrators and assigns, as and for their own proper monies and property; nevertheless upon trust, after raising a certain sum for the purposes therein-mentioned, to lay out and invest the thereby assigned trust premises in government or real securities as therein-mentioned; and upon further trust, that *John Longden* and *David Milne* and the survivor of them and the executors and administrators of such survivor, should, from time to time, during the joint lives of *Anthony Crosbie Martin* and the Plaintiff his wife, pay the interest, dividends, and annual produce of the trust monies, stocks, funds, and securities, and every part thereof, as the same should from time to time become due and payable, unto such person or persons, and for such intents and purposes

as

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as the wife, notwithstanding her marriage should, by any note or writing signed by her, direct or appoint; but so as not to deprive her of the intended use or benefit thereof, by sale or mortgage or otherwise in the way of anticipation; and, in default of such direction or appointment, that they should from time to time pay the same into her proper hands, for her sole and separate use, notwithstanding the marriage, free from the debts, intermeddling, contracts, or engagements of *Anthony Crosbie Martin*; and her receipts were to be sufficient releases and discharges for such dividends, interest, and annual produce: and in case she should happen to survive her husband, and there should be one or more child or children of *Anthony C. Martin* on the body of *Maria Elizabeth Alleyne* his wife, then, from and immediately after the decease of *Anthony C. Martin*, as to one moiety of the said trust monies, stocks, funds, and securities, upon trust, that they, *John Longden* and *David Milne*, or the survivors of them, or the executors or administrators of such survivor, should assign, transfer, or pay the same unto *Maria Elizabeth Alleyne Martin* for her absolute use and benefit; and after declaring, as to the other moiety, certain trusts for the benefit of the issue of the marriage, it was by the indenture further agreed, that, in case there should be no child of the marriage, who should live, being a son, to attain the age of twenty-one years, or, being a daughter, to attain that age or be married, then *John Longden* and *David Milne* should, from and after the decease of *Anthony C. Martin* and such failure of children, pay, assign, and transfer the last-mentioned moiety or half-part of the trust monies and premises thereby assigned, and the stocks, funds, and securities upon which the same should be laid out or invested, or so much thereof as should not have been applied by way of advancement as therein mentioned,

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brother attained the age of twenty-one years, intermarried, without the consent of the Court, with the Defendant *Anthony Crosbie Martin*: and an order was made in the cause, referring it to Mr. *Popham*, then one of the Masters of the Court, to approve of a proper settlement of her real and personal estate upon her and her children. In pursuance of that order an indenture of settlement, dated the 27th day of *August* 1802, and made between *Anthony Crosbie Martin* and his wife of the one part and *John Longden* and *David Milne* of the other part, was approved of by the master, and duly executed. By this settlement *Anthony Crosbie Martin*, in consideration of the marriage, bargained, sold, and assigned unto *John Longden* and *David Milne*, their executors, administrators, and assigns, all those the personal estate and effects therein described of *Maria Elizabeth Alleyne Martin*, and all right, title, claim and demand, both at law and in equity, of him *Anthony Crosbie Martin*, of, in, to, and out of the same and every part thereof, to hold and enjoy the same unto and by *John Longden* and *David Milne*, their executors, administrators and assigns, as and for their own proper monies and property; nevertheless upon trust, after raising a certain sum for the purposes therein-mentioned, to lay out and invest the thereby assigned trust premises in government or real securities as therein-mentioned; and upon further trust, that *John Longden* and *David Milne* and the survivor of them and the executors and administrators of such survivor, should, from time to time, during the joint lives of *Anthony Crosbie Martin* and the Plaintiff his wife, pay the interest, dividends, and annual produce of the trust monies, stocks, funds, and securities, and every part thereof, as the same should from time to time become due and payable, unto such person or persons, and for such intents and purposes

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as the wife, notwithstanding her marriage should, by any note or writing signed by her, direct or appoint; but so as not to deprive her of the intended use or benefit thereof, by sale or mortgage or otherwise in the way of anticipation; and, in default of such direction or appointment, that they should from time to time pay the same into her proper hands, for her sole and separate use, notwithstanding the marriage, free from the debts, intermeddling, contracts, or engagements of *Anthony Crosbie Martin*; and her receipts were to be sufficient releases and discharges for such dividends, interest, and annual produce: and in case she should happen to survive her husband, and there should be one or more child or children of *Anthony C. Martin* on the body of *Maria Elizabeth Alleyne* his wife, then, from and immediately after the decease of *Anthony C. Martin*, as to one moiety of the said trust monies, stocks, funds, and securities, upon trust, that they, *John Longden* and *David Milne*, or the survivors of them, or the executors or administrators of such survivor, should assign, transfer, or pay the same unto *Maria Elizabeth Alleyne Martin* for her absolute use and benefit; and after declaring, as to the other moiety, certain trusts for the benefit of the issue of the marriage, it was by the indenture further agreed, that, in case there should be no child of the marriage, who should live, being a son, to attain the age of twenty-one years, or, being a daughter, to attain that age or be married, then *John Longden* and *David Milne* should, from and after the decease of *Anthony C. Martin* and such failure of children, pay, assign, and transfer the last-mentioned moiety or half-part of the trust monies and premises thereby assigned, and the stocks, funds, and securities upon which the same should be laid out or invested, or so much thereof as should not have been applied by way of advancement as therein mentioned,

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tioned, unto *Maria Elizabeth Alleyne Martin* for her absolute use and benefit: And it was thereby also agreed and declared, that, in case *Anthony C. Martin* should happen to survive his wife, and there should be one or more child or children of the marriage, then, as to one moiety of the said trust-monies and premises, the same should be held upon trust to pay the dividends, interest, and annual produce thereof unto *Anthony C. Martin* or his assigns during the term of his natural life; and as to the other moiety, from and after such decease of the wife, in the life-time of her husband, and also as to the first mentioned moiety, of which the interest, dividends, and annual produce were so directed to be paid to the husband for his life, from and after the decease of him *Anthony C. Martin*, certain trusts were declared, for the benefit of the children of the marriage, and *Anthony C. Martin* in manner therein-mentioned: But if there should be no child of the marriage who should live, being a son, to attain the age of twenty-one years, or, being a daughter, to attain that age or be married, then the trustees were, in case *Anthony C. Martin* should survive his wife, to permit and suffer him and his assigns to receive and take the dividends, interest, and annual produce of the whole of the trust monies to his and their own use and benefit during his natural life; and from and immediately after his decease, to pay, assign, and transfer the same, or so much thereof as should not have been applied by way of advancement, in pursuance of the powers therein contained, unto such person, and for such intents and purposes, and in such parts, shares, and proportions, manners, and form as *Maria Elizabeth Alleyne Martin*, by her last will and testament, &c., to be signed, published and attested as therein-mentioned, should direct or appoint; and in default of such direction or appointment, unto such person or persons as, at the time of
the

the death of *Maria Elizabeth Alleyne Martin*, would have been entitled to her personal estate, in case she had died without having been married and intestate: And *Anthony C. Martin* did for himself, his heirs, executors, and administrators, and for his wife, covenant with *John Longden* and *David Milne*, their heirs, executors, and administrators, and she *Maria Elizabeth Alleyne Martin*, so far as in her lay, and she could and lawfully might, did consent and agree, that in case she should live to attain the age of twenty-one years, or such other age, as, according to the laws of the colony of *Demerara*, should render her competent to concur in the settlement, he *Anthony C. Martin* and she *Maria Elizabeth Alleyne Martin*, and all other persons claiming, or to claim, by, from, under, or in trust for them or either of them, would, immediately upon her attaining the age of twenty-one years or such other age as aforesaid, or as soon after as might be, at the costs and charges of *Anthony C. Martin*, by such conveyances and assurances in the law as *John Longden* and *David Milne*, &c., should in that behalf direct and reasonably require, convey and assure, unto *John Longden* and *David Milne*, their heirs, executors and administrators, as well all that undivided moiety of them *Anthony C. Martin* and *Maria* his wife or one of them in her right, as also the other moiety to which she, or *Anthony C. Martin* in her right, was entitled in reversion or remainder, expectant upon the decease of her brother under the age of twenty-one years, of and in the plantation called *New Orange Nassau*, with the boiling-houses, still-houses, and other out-houses and buildings thereunto belonging, situate and being in the colony of *Demerara*, with the plantation utensils and implements, slaves, cattle, and all other estate real and personal thereunto belonging, situate, lying, and being in the said colony, with the appurtenances, to hold the same unto and to the use of them *John Longden* and *David*

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David Milne, their heirs, executors, administrators, and assigns, according to the tenure, nature, and quality of the same premises respectively, upon the trusts, and under and subject to the same powers, provisoes, declarations and agreements as were thereinbefore expressed and contained of and concerning the beforementioned trust-monies, and the stocks, funds, and securities on which the same should be invested, or as near and conformably to the said trusts, powers, provisos, declarations and agreements as the deaths of the persons and the nature of the several properties would permit: and, in order that the respective estates thereby settled and covenanted to be settled might go in the same course of succession, it was agreed and declared that the plantation, hereditaments and premises, should, for the purposes of the settlement, be considered as personal estate; and that in the meantime, and until such conveyance, assurance, or settlement should be executed as aforesaid, the rents, issues, and produce of the premises so to be conveyed, settled, and assured, should go and be paid to and received by the same persons, and in the same manner, as if such conveyance and assurance had been actually made.

Maria Elizabeth Alleyne Martin, some time after, attained the age of twenty-one years; and by indentures of lease and release, bearing date the 21st and 22d days of *January* 1806, indorsed on the indenture of settlement, and made between *Anthony C. Martin* and *Maria* his wife of the one part, and *John Longden* and *David Milne* of the other part, — reciting that *Maria E. A. Martin* had then lately attained the age of twenty-one years, and that therefore *Anthony C. Martin* and his wife were desirous, in pursuance of their covenant contained in the indenture, to make and execute such conveyance and assurance of their undivided moiety of the plantation

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ation and hereditaments, to which the Plaintiff or her husband in her right became absolutely entitled on her attaining the age of twenty-one years, upon the trusts in and by the settlement expressed, — *Anthony C. Martin* and *Maria* his wife granted, bargained, sold, aliened, assigned, transferred, and set over unto *John Longden* and *David Milne*, and to their heirs and assigns, all that one undivided moiety of them, *Anthony C. Martin* and *Maria* his wife, or one of them in her right, of and in the plantation or parcel of land and hereditaments commonly called *New Orange Nassau*, with all houses and out-houses and buildings thereunto annexed, with the plantation utensils and implements, slaves and cattle, and the offspring and progeny thereof respectively, and all the appurtenances whatever to the said hereditaments and premises belonging, and of and in all other the hereditaments and premises in and by the indenture of settlement covenanted and agreed to be conveyed and assigned respectively, to hold such part or parts of the same plantation, hereditaments, and premises as were of the nature of real estate with the appurtenances, unto and to the use of *John Longden* and *David Milne*, their heirs and assigns, and to hold such part and parts of the said premises as were of the nature of personal estates or chattel interests, and every part thereof, unto the said *John Longden* and *David Milne*, their executors, administrators, and assigns, according to the nature and quality thereof, nevertheless, upon and for the several trusts, and subject to the provisoes, declarations, and agreements in and by the indenture of the 27th of *August* 1802 expressed and declared of and concerning the same, or such or so many of them as were then subsisting undetermined and capable of taking effect.

These several indentures were duly recorded in the proper office in the colony of *Demerara*.

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The brother of *Mrs. Martin* attained twenty-one and afterwards died, leaving a daughter *Jane L'Espinasse* his only child. *David Milne* was his executor and the guardian of his child.

In the year 1807, or soon afterwards, the plantation and estates became indebted to various persons for stores and supplies; and it was deemed necessary to raise a sum of money for the use and benefit of the estate, and to meet the wants of *Mr. and Mrs. Martin*, and of *Jane L'Espinasse*. *Mr. John Wilson*, who resided in *Demerara*, had been for some time receiver and manager of the plantation; and in order to procure funds to enable him to carry on the concern, he drew a bill of exchange, for a sum of 1522*l.* 15*s.* 2*d.*, on *Mr. Gladstone* a merchant of *Liverpool*. He at the same time sent to *Mr. Gladstone* a letter explaining the reason why and the purposes for which the bill was drawn; and in it he gave an account of the pecuniary state of the plantation, and proposed that *Mr. Gladstone* should become consignee of the plantation in *England*. *Anthony C. Martin* also sent a letter to *David Milne*, dated the 21st day of *January* 1808, inclosing a copy of *Wilson's* letter to *Mr. Gladstone*. The intention was that *Mr. Gladstone* should become the consignee in *England* of the plantation, and should in that character advance the amount of the bill and such other sums as might be necessary for the purposes of the concern. Upon the arrival of the letters of *Mr. Wilson* and *Mr. Martin* in *England*, some correspondence on the subject took place between *Mr. Gladstone* and *David Milne*, and *Mr. Gladstone* paid a sum of 808*l.* 17*s.* 3*d.* in part of the bill; but they did not finally come to any agreement as to the terms upon which *Mr. Gladstone* should accept the bill of exchange, and act as the consignee of the plantation in *England*; and *Mr. Gladstone* had no further transaction connected with the plantation. In the hope of obtaining better terms than were

were required by Mr. Gladstone, *David Milne* applied to the house of *Reed* and *Bell* in *London*, with whom he had some connection in business: and it was ultimately agreed between Mr. *Milne* and the firm of *Reed* and *Bell* that they should make the necessary advances for the estate, and receive the consignments as proposed in Mr. *Wilson's* letter; that, there being a sum of 808*l.* 17*s.* 3*d.* due to Mr. *Gladstone* in respect of his advances, Messrs. *Reed* and *Bell* should pay him that sum; and that a mortgage should be executed to them of the plantation and property in *Demerara* to secure to them the advances they might make in respect of it. In pursuance of this arrangement, Messrs. *Reed* and *Bell* advanced money and accepted bills; and an indenture of mortgage was prepared for execution, bearing date the 31st of *March* 1809, and made between *Anthony C. Martin* and *Maria* his wife of the first part, *John Longden* and *David Milne* of the second part, and *James Bell* of the third part, which *James Bell* together with *Charles Reed* were then the partners of the house of *Reed* and *Bell*, whereby, after reciting that *Anthony C. Martin* and *Maria* his wife, and also *David Milne* as such executor and guardian as aforesaid, had applied to and requested *James Bell* to advance and lend the sum of 1000*l.*, and that, in order to secure the repayment thereof with interest, after the rate of 6 per cent., and also any further sum of money which *James Bell* might advance for *Anthony C. Martin* and his wife, and also for *David Milne* as such guardian, and any or either of them, not exceeding the sum of 3000*l.*, and interest at the rate aforesaid on such further sum or sums of money from the time or respective times of advancing the same, they *Anthony C. Martin* and *Maria* his wife, and also *John Longden* and *David Milne*, had proposed and agreed to assign the entirety of the plantation, hereditaments, and premises to *James Bell*, his executors, administrators,

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and assigns by way of mortgage, it was witnessed, that in consideration of the said sum of 1000*l.* paid to *Anthony C. Martin* and *Maria* his wife, and to *David Milne* as such guardian as aforesaid, in trust for *Jane L'Espinasse*, and for the other considerations therein mentioned, *John Longden* and *David Milne*, at the request and by the direction and appointment of *Anthony C. Martin* and *Maria* his wife, did grant, bargain, sell, demise, assign, transfer, and set over, and *Anthony C. Martin* and *Maria* his wife did direct, limit, and appoint, grant, bargain, sell, demise, assign, and set over, ratify, and confirm, and also *David Milne*, as such executor or guardian as aforesaid, did grant, bargain, sell, and demise, assign, transfer, and set over unto *James Bell*, his executors, administrators, and assigns, all that the entirety of the plantation or parcel of land commonly called or known by the name of *New Orange Nassau*, with the boiling-house, curing-house, still-houses, and other out-houses and buildings thereunto belonging, situate, lying, and being in the colony of *Demerara*, together with the plantation, utensils, and implements, slaves, and cattle, and the offspring and progeny thereof respectively, to hold unto *James Bell*, his executors, administrators, and assigns for the term of 1000 years thence next ensuing, subject to a proviso for redemption on payment of the sum of 1000*l.* and interest, in manner therein mentioned, together with such further sum or sums of money, not exceeding the sum of 3000*l.*, which *James Bell* should advance for *Anthony C. Martin* and the Plaintiff, and also *David Milne*, in their respective capacities, with interest at the rate aforesaid.

This indenture was executed by *Anthony C. Martin* and *Maria* his wife, and by *David Milne*, and was duly enrolled and registered at *Demerara*, according to the law prevailing in that colony.

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The advances made by the house of *Reed* and *Bell* on account of the plantation and its owners having greatly exceeded the amount of their mortgage, Messrs. *Reed* and *Bell* requested from *David Milne* and *Anthony C. Martin* and *Maria* his wife a further security; and accordingly a deed-poll of further charge and mortgage, bearing date the 14th of *September* 1812, was endorsed on the last-mentioned indenture of mortgage. This deed-poll was made in the names of *Anthony C. Martin* and *Maria* his wife, and *John Longden* and *David Milne*, and thereby, after reciting that, since the date and execution of the indenture of the 31st of *March* 1809, *James Bell* had lent and advanced to *Anthony C. Martin* and *Maria* his wife, and to *David Milne* as such executor and guardian as aforesaid, the further sum of 3000*l.*, and that *Anthony C. Martin* and his wife and *David Milne* had requested *James Bell* to advance and lend a further sum to the extent of 9000*l.*, exclusive of the sum then due to him, which he had consented to do upon having the same with interest secured to him by a further charge or mortgage upon the plantation, it was declared that, in consideration of the further advance to be made by *James Bell*, they, *Anthony C. Martin* and *Maria* his wife, and *John Longden* and *David Milne*, did subject and charge the plantation with the repayment, not only of the sum of 3000*l.* and interest, but also of all such further sums as the said *James Bell* had then already advanced, or should thereafter advance, with interest, after the rate of 6 per cent., not exceeding the sum of 9000*l.* exclusive of the sum of 3000*l.*; and *Anthony C. Martin* and *Maria* his wife, and *John Longden* and *David Milne*, covenanted that the plantation and hereditaments should stand charged as well with the sum of 3000*l.* and interest, as with such other sum as *James Bell* should advance as aforesaid.


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David Milne executed this deed-poll for himself, and, by power of attorney authorising him so to do, for the other parties to it; and it was duly enrolled and registered in the colony of *Demerara*. The name of *James Bell*, it was admitted, was made use of in these transactions as a trustee on behalf of himself and of *Charles Reed* as copartners.

The sums of money advanced by Messrs. *Reed* and *Bell* on account of the plantation and the owners of it, subsequently to 1812, having greatly increased in amount, it became necessary that a further security should be executed to them; and accordingly a power of attorney, bearing date the 1st of *March* 1815, was executed by *Anthony C. Martin* and his wife to *John Wilson*, Esq. of *Demerara*, thereby authorising him to appear before the commissioners of the court of civil and criminal justice of *Demerara*, and in the names of them *Anthony C. Martin* and *Maria* his wife, as the lawful proprietors of an undivided moiety of the plantation named *New Orange Nassau*, to declare them, *Anthony C. Martin* and *Maria* his wife, to be truly and justly indebted unto *James Bell* of *London*, merchant, a partner in the mercantile house or firm of *Reed, Bell, and Co.*, his order, heirs, or assigns, in the sum of 8612*l.* 19*s.* 5*d.*; and to promise to repay the sum of 8612*l.* 19*s.* 5*d.* to *James Bell*, his order, heirs, or assigns, free and without charges, in three equal annual instalments, at the times therein mentioned, with interest; and for the better security thereof, to put the said *J. Bell* in possession of the one undivided moiety of the plantation called *New Orange Nassau*, with all negroes thereupon belonging to the same, buildings, and further dependencies, to be taken by both the respective parties, according to the inventory thereof, until the debt of 8612*l.* 19*s.* 5*d.*, with the interest due thereon, should have been paid off and settled; with power to *James Bell* to ad-
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minister alone the undivided half of the plantation, or to cause it to be administered by his agents, and to ship and consign the produce already in hand and further to be gathered to such persons or houses of trade in *London*, and, in case of the surrender of the colony to *Holland*, in *Amsterdam*, as *James Bell* should think proper. The instrument contained various other clauses in order to make the security effectual; according to the law of the colony.

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A similar power of attorney was executed to *John Wilson* by *David Milne* and *John Longden*; and the name of the Defendant *James Bell* was used in both these documents in trust for himself and his partners.

By virtue of these powers *John Wilson* appeared as the attorney of *Anthony C. Martin* and his wife, and of *J. Longden* and *David Milne* as trustees, before the court of criminal and civil justice at *Demerara*, and, in the forms required by the *Dutch* law, passed a mortgage of a moiety of the plantation, dated the 1st of *September* 1815, in the terms and upon the conditions contained in the letters of attorney. Shortly afterwards, what was called a sentence of willing condemnation was obtained against the plantation, whereby the house of *Reed, Bell, and Co.* became entitled to sell the plantation, and to apply the money arising from the sale in liquidation of their debt.

At a subsequent period *Bell* and *Grant* became the successors in business of *Reed* and *Bell*, and the debt and the securities were vested in the new firm.

A settlement of accounts having taken place, an agreement was entered into, bearing date the 27th day of *April* 1820, and made between *Bell* and *Grant* as co-

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partners of the one part, and *Anthony C. Martin* and his wife of the other part, whereby — after reciting that *Anthony C. Martin* was indebted to the Defendants as partners and successors in trade of the house of *Reed, Bell, and Co.* in a considerable sum of money secured to them by several mortgages upon certain estates of *Anthony C. Martin* in *Ireland*, and upon the moiety of a plantation called *New Orange Nassau* in *Demerara*, which last-mentioned mortgage was taken in the name of *James Bell*, as a partner in the house of *Reed, Bell, and Co.*, on behalf of the firm; and that disputes had for some time existed between *Anthony C. Martin* and *Bell* and *Grant*, their predecessors or partners, respecting the balance claimed by them to be due from *Anthony C. Martin*, amounting on the 31st of *December* 1819 to the sum of 10,331*l.* 1*s.* 8*d.*, from which sum *Anthony C. Martin* claimed certain allowances in respect of an alleged possession of the mortgaged estates by the house of *Reed, Bell, and Co.*; and in order to put an end to these disputes, the parties thereto had agreed to the terms and conditions therein mentioned, — it was witnessed that, for the considerations therein mentioned, *Anthony C. Martin* and the Plaintiff his wife and the Defendants did thereby severally and respectively covenant with the other and others of them, that the amount then due from *Anthony C. Martin* upon the several mortgages should be agreed at the sum of 9000*l.* as a final balance, such balance to be binding and conclusive on both parties; that *Anthony C. Martin* should relinquish all title and claim to allowances and deductions, and *Bell* and *Grant* agree to limit and reduce their demand to that sum; that *Anthony C. Martin* should, within nine months, pay the sum of 9000*l.*, or the greater or less sum as the case might be, which should then be due, with interest; that in the meantime *Bell* and *Grant* should retain the mortgage securities and all the title deeds relating thereto, and all remedies thereon,

thereon, except only so far as such remedies might be suspended or varied by the agreement; that they should be at liberty, immediately on the execution of the agreement, and should be authorised by *Anthony C. Martin* and his wife and all proper parties, by an instrument to be executed at the same time with the agreement, to take such proceedings on or by virtue of the mortgage of the moiety of the plantation and estate called *New Orange Nassau* as by the law of *Demerara* might be necessary, to ratify and confirm the mortgage thereon for the sum of 9000*l.*, or the greater or less sum actually due, as the case might be, and interest, as the counsel for the Defendants should advise, and as fully and effectually in every respect as if all the forms used in *Demerara* for such a purpose were therein inserted; that if *Anthony C. Martin* should not within the time prescribed pay the principal and interest, *Bell* and *Grant* should be at liberty, and they were thereby authorised, to foreclose the mortgage of the plantation, and to enter thereon and make sale thereof, and the stocks, slaves, and effects thereon, or to take such other proceedings relative to the mortgage and estate as they should think fit, without being compelled to have recourse in the first instance to the mortgages on the estates in *Ireland*; it being the intent and meaning of all the parties that the mortgage on the plantation in *Demerara* should be deemed and considered as the first security to the Defendants, and to be resorted to by them in the first instance: and it was further agreed that although *Anthony C. Martin* should not within the time limited pay the sum of 9000*l.*, yet the sum of 9000*l.* should be taken as the agreed debt between the parties upon the old account, and neither party should be at liberty to open the same, and revive any of the claims or disputes existing between them, touching the amount of the debt or the debts claimed thereupon, previously thereto; that *Anthony C. Martin* and his

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David Milne, their heirs, executors, administrators, and assigns, according to the tenure, nature, and quality of the same premises respectively, upon the trusts, and under and subject to the same powers, provisoes, declarations and agreements as were thereinbefore expressed and contained of and concerning the beforementioned trust-monies, and the stocks, funds, and securities on which the same should be invested, or as near and conformably to the said trusts, powers, provisos, declarations and agreements as the deaths of the persons and the nature of the several properties would permit: and, in order that the respective estates thereby settled and covenanted to be settled might go in the same course of succession, it was agreed and declared that the plantation, hereditaments and premises, should, for the purposes of the settlement, be considered as personal estate; and that in the meantime, and until such conveyance, assurance, or settlement should be executed as aforesaid, the rents, issues, and produce of the premises so to be conveyed, settled, and assured, should go and be paid to and received by the same persons, and in the same manner, as if such conveyance and assurance had been actually made.

Maria Elizabeth Alleyne Martin, some time after, attained the age of twenty-one years; and by indentures of lease and release, bearing date the 21st and 22d days of *January* 1806, indorsed on the indenture of settlement, and made between *Anthony C. Martin* and *Maria* his wife of the one part, and *John Longden* and *David Milne* of the other part, — reciting that *Maria E. A. Martin* had then lately attained the age of twenty-one years, and that therefore *Anthony C. Martin* and his wife were desirous, in pursuance of their covenant contained in the indenture, to make and execute such conveyance and assurance of their undivided moiety of the plantation

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charging the debts due from the moiety of the plantation belonging to *Anthony C. Martin* and the Plaintiff his wife, or one of them; partly, at the request and entreaty of *Mrs. Martin*, for the subsistence of herself, her husband, and children, to provide them with comforts, and to preserve them from wanting the common necessaries of life; and partly for the purpose of supplying stores for the use of the plantation, and in their character of consignees to the plantation.

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In 1820, a suit was instituted in the Court of Chancery, in the name of the infant *Jane L'Espinasse*, by her next friend, to which *Reed* and *Bell*, together with *A. C. Martin* and his wife, and *George Milne*, were Defendants. By a decree in that suit, bearing date the 25th day of *March* 1820, it was referred to the Master to inquire whether the estate of the infant had been or was liable in respect of any, and if any of which, of the several sums secured by the mortgage and further charge bearing date the 31st of *March* 1809 and the 5th of *September* 1815. The Master made his report in that cause on the 20th of *February* 1821; and by it he allowed the Defendants *Reed* and *Bell* such sums as were properly chargeable against the infant's moiety.

The present bill was filed by *Mrs. Martin* for the purpose of having it declared that the several mortgages and charges were fraudulent and void, as against the articles of agreement of the 27th day of *August* 1802, and the settlement of the 21st and 22d days of *January* 1806.

A cross bill was filed by *James Christian Clement Bell* and *Robert Grant*, the present partners in the firm of *Bell and Grant*, for the purpose of establishing the mortgages and charges.

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The brother of Mrs. *Martin* attained twenty-one and afterwards died, leaving a daughter *Jane L'Espinasse* his only child. *David Milne* was his executor and the guardian of his child.

In the year 1807, or soon afterwards, the plantation and estates became indebted to various persons for stores and supplies; and it was deemed necessary to raise a sum of money for the use and benefit of the estate, and to meet the wants of Mr. and Mrs. *Martin*, and of *Jane L'Espinasse*. Mr. *John Wilson*, who resided in *Demerara*, had been for some time receiver and manager of the plantation; and in order to procure funds to enable him to carry on the concern, he drew a bill of exchange, for a sum of 1522*l.* 15*s.* 2*d.*, on Mr. *Gladstone* a merchant of *Liverpool*. He at the same time sent to Mr. *Gladstone* a letter explaining the reason why and the purposes for which the bill was drawn; and in it he gave an account of the pecuniary state of the plantation, and proposed that Mr. *Gladstone* should become consignee of the plantation in *England*. *Anthony C. Martin* also sent a letter to *David Milne*, dated the 21st day of *January* 1808, inclosing a copy of *Wilson's* letter to Mr. *Gladstone*. The intention was that Mr. *Gladstone* should become the consignee in *England* of the plantation, and should in that character advance the amount of the bill and such other sums as might be necessary for the purposes of the concern. Upon the arrival of the letters of Mr. *Wilson* and Mr. *Martin* in *England*, some correspondence on the subject took place between Mr. *Gladstone* and *David Milne*, and Mr. *Gladstone* paid a sum of 808*l.* 17*s.* 3*d.* in part of the bill; but they did not finally come to any agreement as to the terms upon which Mr. *Gladstone* should accept the bill of exchange, and act as the consignee of the plantation in *England*; and Mr. *Gladstone* had no further transaction connected with the plantation. In the hope of obtaining better terms than were

were required by Mr. Gladstone, David Milne applied to the house of Reed and Bell in London, with whom he had some connection in business: and it was ultimately agreed between Mr. Milne and the firm of Reed and Bell that they should make the necessary advances for the estate, and receive the consignments as proposed in Mr. Wilson's letter; that, there being a sum of 808*l.* 17*s.* 3*d.* due to Mr. Gladstone in respect of his advances, Messrs. Reed and Bell should pay him that sum; and that a mortgage should be executed to them of the plantation and property in Demerara to secure to them the advances they might make in respect of it. In pursuance of this arrangement, Messrs. Reed and Bell advanced money and accepted bills; and an indenture of mortgage was prepared for execution, bearing date the 31st of March 1809, and made between Anthony C. Martin and Maria his wife of the first part, John Longden and David Milne of the second part, and James Bell of the third part, which James Bell together with Charles Reed were then the partners of the house of Reed and Bell, whereby, after reciting that Anthony C. Martin and Maria his wife, and also David Milne as such executor and guardian as aforesaid, had applied to and requested James Bell to advance and lend the sum of 1000*l.*, and that, in order to secure the repayment thereof with interest, after the rate of 6 per cent., and also any further sum of money which James Bell might advance for Anthony C. Martin and his wife, and also for David Milne as such guardian, and any or either of them, not exceeding the sum of 3000*l.*, and interest at the rate aforesaid on such further sum or sums of money from the time or respective times of advancing the same, they Anthony C. Martin and Maria his wife, and also John Longden and David Milne, had proposed and agreed to assign the entirety of the plantation, hereditaments, and premises to James Bell, his executors, administrators,

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and assigns by way of mortgage, it was witnessed, that in consideration of the said sum of 1000*l.* paid to *Anthony C. Martin* and *Maria* his wife, and to *David Milne* as such guardian as aforesaid, in trust for *Jane L'Espinasse*, and for the other considerations therein mentioned, *John Longden* and *David Milne*, at the request and by the direction and appointment of *Anthony C. Martin* and *Maria* his wife, did grant, bargain, sell, demise, assign, transfer, and set over, and *Anthony C. Martin* and *Maria* his wife did direct, limit, and appoint, grant, bargain, sell, demise, assign, and set over, ratify, and confirm, and also *David Milne*, as such executor or guardian as aforesaid, did grant, bargain, sell, and demise, assign, transfer, and set over unto *James Bell*, his executors, administrators, and assigns, all that the entirety of the plantation or parcel of land commonly called or known by the name of *New Orange Nassau*, with the boiling-house, curing-house, still-houses, and other out-houses and buildings thereunto belonging, situate, lying, and being in the colony of *Demerara*, together with the plantation, utensils, and implements, slaves, and cattle, and the offspring and progeny thereof respectively, to hold unto *James Bell*, his executors, administrators, and assigns for the term of 1000 years thence next ensuing, subject to a proviso for redemption on payment of the sum of 1000*l.* and interest, in manner therein mentioned, together with such further sum or sums of money, not exceeding the sum of 5000*l.*, which *James Bell* should advance for *Anthony C. Martin* and the Plaintiff, and also *David Milne*, in their respective capacities, with interest at the rate aforesaid.

This indenture was executed by *Anthony C. Martin* and *Maria* his wife, and by *David Milne*, and was duly enrolled and registered at *Demerara*, according to the law prevailing in that colony.

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The advances made by the house of *Reed* and *Bell* on account of the plantation and its owners having greatly exceeded the amount of their mortgage, Messrs. *Reed* and *Bell* requested from *David Milne* and *Anthony C. Martin* and *Maria* his wife a further security; and accordingly a deed-poll of further charge and mortgage, bearing date the 14th of *September* 1812, was endorsed on the last-mentioned indenture of mortgage. This deed-poll was made in the names of *Anthony C. Martin* and *Maria* his wife, and *John Longden* and *David Milne*, and thereby, after reciting that, since the date and execution of the indenture of the 31st of *March* 1809, *James Bell* had lent and advanced to *Anthony C. Martin* and *Maria* his wife, and to *David Milne* as such executor and guardian as aforesaid, the further sum of 3000*l.*, and that *Anthony C. Martin* and his wife and *David Milne* had requested *James Bell* to advance and lend a further sum to the extent of 3000*l.*, exclusive of the sum then due to him, which he had consented to do upon having the same with interest secured to him by a further charge or mortgage upon the plantation, it was declared that, in consideration of the further advance to be made by *James Bell*, they, *Anthony C. Martin* and *Maria* his wife, and *John Longden* and *David Milne*, did subject and charge the plantation with the repayment, not only of the sum of 3000*l.* and interest, but also of all such further sums as the said *James Bell* had then already advanced, or should thereafter advance, with interest, after the rate of 6 per cent., not exceeding the sum of 9000*l.* exclusive of the sum of 3000*l.*; and *Anthony C. Martin* and *Maria* his wife, and *John Longden* and *David Milne*, covenanted that the plantation and hereditaments should stand charged as well with the sum of 3000*l.* and interest, as with such other sum as *James Bell* should advance as aforesaid.

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David Milne executed this deed-poll for himself, and, by power of attorney authorising him so to do, for the other parties to it; and it was duly enrolled and registered in the colony of *Demerara*. The name of *James Bell*, it was admitted, was made use of in these transactions as a trustee on behalf of himself and of *Charles Reed* as copartners.

The sums of money advanced by Messrs. *Reed* and *Bell* on account of the plantation and the owners of it, subsequently to 1812, having greatly increased in amount, it became necessary that a further security should be executed to them; and accordingly a power of attorney, bearing date the 1st of *March* 1815, was executed by *Anthony C. Martin* and his wife to *John Wilson*, Esq. of *Demerara*, thereby authorising him to appear before the commissioners of the court of civil and criminal justice of *Demerara*, and in the names of them *Anthony C. Martin* and *Maria* his wife, as the lawful proprietors of an undivided moiety of the plantation named *New Orange Nassau*, to declare them, *Anthony C. Martin* and *Maria* his wife, to be truly and justly indebted unto *James Bell* of *London*, merchant, a partner in the mercantile house or firm of *Reed, Bell, and Co.*, his order, heirs, or assigns, in the sum of 8612*l.* 19*s.* 5*d.*; and to promise to repay the sum of 8612*l.* 19*s.* 5*d.* to *James Bell*, his order, heirs, or assigns, free and without charges, in three equal annual instalments, at the times therein mentioned, with interest; and for the better security thereof, to put the said *J. Bell* in possession of the one undivided moiety of the plantation called *New Orange Nassau*, with all negroes thereupon belonging to the same, buildings, and further dependencies, to be taken by both the respective parties, according to the inventory thereof, until the debt of 8612*l.* 19*s.* 5*d.*, with the interest due thereon, should have been paid off and settled; with power to *James Bell* to ad-
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minister alone the undivided half of the plantation, or to cause it to be administered by his agents, and to ship and consign the produce already in hand and further to be gathered to such persons or houses of trade in *London*, and, in case of the surrender of the colony to *Holland*, in *Amsterdam*, as *James Bell* should think proper. The instrument contained various other clauses in order to make the security effectual; according to the law of the colony.

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A similar power of attorney was executed to *John Wilson* by *David Milne* and *John Longden*; and the name of the Defendant *James Bell* was used in both these documents in trust for himself and his partners.

By virtue of these powers *John Wilson* appeared as the attorney of *Anthony C. Martin* and his wife, and of *J. Longden* and *David Milne* as trustees, before the court of criminal and civil justice at *Demerara*, and, in the forms required by the *Dutch* law, passed a mortgage of a moiety of the plantation, dated the 1st of *September* 1815, in the terms and upon the conditions contained in the letters of attorney. Shortly afterwards, what was called a sentence of willing condemnation was obtained against the plantation, whereby the house of *Reed, Bell, and Co.* became entitled to sell the plantation, and to apply the money arising from the sale in liquidation of their debt.

At a subsequent period *Bell* and *Grant* became the successors in business of *Reed and Bell*, and the debt and the securities were vested in the new firm.

A settlement of accounts having taken place, an agreement was entered into, bearing date the 27th day of *April* 1820, and made between *Bell* and *Grant* as co-

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partners of the one part, and *Anthony C. Martin* and his wife of the other part, whereby — after reciting that *Anthony C. Martin* was indebted to the Defendants as partners and successors in trade of the house of *Reed, Bell, and Co.* in a considerable sum of money secured to them by several mortgages upon certain estates of *Anthony C. Martin* in *Ireland*, and upon the moiety of a plantation called *New Orange Nassau* in *Demerara*, which last-mentioned mortgage was taken in the name of *James Bell*, as a partner in the house of *Reed, Bell, and Co.*, on behalf of the firm; and that disputes had for some time existed between *Anthony C. Martin* and *Bell* and *Grant*, their predecessors or partners, respecting the balance claimed by them to be due from *Anthony C. Martin*, amounting on the 31st of *December* 1819 to the sum of 10,331*l.* 1*s.* 8*d.*, from which sum *Anthony C. Martin* claimed certain allowances in respect of an alleged possession of the mortgaged estates by the house of *Reed, Bell, and Co.*; and in order to put an end to these disputes, the parties thereto had agreed to the terms and conditions therein mentioned, — it was witnessed that, for the considerations therein mentioned, *Anthony C. Martin* and the Plaintiff his wife and the Defendants did thereby severally and respectively covenant with the other and others of them, that the amount then due from *Anthony C. Martin* upon the several mortgages should be agreed at the sum of 9000*l.* as a final balance, such balance to be binding and conclusive on both parties; that *Anthony C. Martin* should relinquish all title and claim to allowances and deductions, and *Bell* and *Grant* agree to limit and reduce their demand to that sum; that *Anthony C. Martin* should, within nine months, pay the sum of 9000*l.*, or the greater or less sum as the case might be, which should then be due, with interest; that in the meantime *Bell* and *Grant* should retain the mortgage securities and all the title deeds relating thereto, and all remedies thereon,

thereon, except only so far as such remedies might be suspended or varied by the agreement; that they should be at liberty, immediately on the execution of the agreement, and should be authorised by *Anthony C. Martin* and his wife and all proper parties, by an instrument to be executed at the same time with the agreement, to take such proceedings on or by virtue of the mortgage of the moiety of the plantation and estate called *New Orange Nassau* as by the law of *Demerara* might be necessary, to ratify and confirm the mortgage thereon for the sum of 9000*l.*, or the greater or less sum actually due, as the case might be, and interest, as the counsel for the Defendants should advise, and as fully and effectually in every respect as if all the forms used in *Demerara* for such a purpose were therein inserted; that if *Anthony C. Martin* should not within the time prescribed pay the principal and interest, *Bell* and *Grant* should be at liberty, and they were thereby authorised, to foreclose the mortgage of the plantation, and to enter thereon and make sale thereof, and the stocks, slaves, and effects thereon, or to take such other proceedings relative to the mortgage and estate as they should think fit, without being compelled to have recourse in the first instance to the mortgages on the estates in *Ireland*; it being the intent and meaning of all the parties that the mortgage on the plantation in *Demerara* should be deemed and considered as the first security to the Defendants, and to be resorted to by them in the first instance: and it was further agreed that although *Anthony C. Martin* should not within the time limited pay the sum of 9000*l.*, yet the sum of 9000*l.* should be taken as the agreed debt between the parties upon the old account, and neither party should be at liberty to open the same, and revive any of the claims or disputes existing between them, touching the amount of the debt or the debts claimed thereupon, previously thereto; that *Anthony C. Martin* and his

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wife, and all other necessary parties, should, at the request of the Defendants, make and execute all such further deeds, instruments, and assignments, as might be necessary and proper to carry that agreement into full effect; and that in case of such default as aforesaid, the several mortgages so held by or in trust for *Bell and Grant* should, notwithstanding that agreement, be in full force and effect for the sum of 9000*l.*, or the greater or less sum actually due, as the case might be, and interest at 6 per cent. per annum.

In order to carry this agreement into effect, a power of attorney, bearing date the same 27th of *April 1820*, was executed by *Anthony C. Martin* and his wife, *George Milne*, the son of *David Milne*, *James Christian Clement Bell*, described as the heir at law and administrator of *James Bell*, and *Robert Grant* his partner, by which, after reciting the articles of agreement, the parties constituted *Frederick Cost* of *Demerara* their attorney, and authorised him to appear in the Court of Civil and Criminal Justice in the colony of *Demerara*, and to acknowledge and declare that he *Anthony C. Martin* was justly indebted unto *Bell and Grant*, upon and by virtue of the mortgage of the 5th of *September 1815*, in the sum of 9000*l.* sterling; and to confirm to them the full possession of the moiety of the plantation, negroes, and stock granted by *John Longden* and *David Milne*. *Frederick Cost*, in pursuance of this power, and in the forms required by the *Dutch* laws, duly passed the mortgage, and took all necessary steps for carrying the articles of agreement into effect. The time stipulated for the payment of the sum of 9000*l.* expired on the 29th of *June 1821*; and the money was not paid.

The sums of money secured by the mortgages were advanced by *Reed and Bell* and their successors in business, partly for the purpose of satisfying and discharging

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charging the debts due from the moiety of the plantation belonging to *Anthony C. Martin* and the Plaintiff his wife, or one of them; partly, at the request and entreaty of *Mrs. Martin*, for the subsistence of herself, her husband, and children, to provide them with comforts, and to preserve them from wanting the common necessities of life; and partly for the purpose of supplying stores for the use of the plantation, and in their character of consignees to the plantation.

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In 1820, a suit was instituted in the Court of Chancery, in the name of the infant *Jane L'Espinasse*, by her next friend, to which *Reed* and *Bell*, together with *A. C. Martin* and his wife, and *George Milne*, were Defendants. By a decree in that suit, bearing date the 25th day of *March* 1820, it was referred to the Master to inquire whether the estate of the infant had been or was liable in respect of any, and if any of which, of the several sums secured by the mortgage and further charge bearing date the 31st of *March* 1809 and the 5th of *September* 1815. The Master made his report in that cause on the 20th of *February* 1821; and by it he allowed the Defendants *Reed* and *Bell* such sums as were properly chargeable against the infant's moiety.

The present bill was filed by *Mrs. Martin* for the purpose of having it declared that the several mortgages and charges were fraudulent and void, as against the articles of agreement of the 27th day of *August* 1802, and the settlement of the 21st and 22d days of *January* 1806.

A cross bill was filed by *James Christian Clement Bell* and *Robert Grant*, the present partners in the firm of *Bell* and *Grant*, for the purpose of establishing the mortgages and charges.

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By the decree made at the original hearing of these causes, bearing date the 15th of *December* 1829, it was referred to the Master to inquire whether, by the law of *Demerara*, the legal estate in the Plaintiff *M. E. A. Martin's* moiety of the plantation and premises in the pleadings mentioned passed to the trustees of the deeds of lease and release, bearing date respectively the 21st and 22d days of *January* 1806; and also to inquire whether by the law of *Demerara*, and, in case where there was no ante-nuptial contract, any contract binding the wife's real property could, after marriage, be made between the husband and wife, or between the husband and other persons as trustees for the benefit of the wife and children; and also to inquire whether, after a valid settlement made, by the law of *Demerara*, for the separate benefit of the wife, with remainder to the children, the husband could in any and what manner, and under what circumstances, renounce the benefit of such settlement in favour of any and what creditors; and also to inquire in whom the legal estate in the moiety of the plantations in question was, by the law of *Demerara*, then vested, and by what means; and whether, by the law of *Demerara*, there was a lien upon the estate for monies advanced for the support of a wife and her children, or for stores, supplies, and necessaries for the estate, and whether it made any difference in that respect that the estate was originally the estate of the wife, and was settled for the separate benefit of the wife, with remainder to the children: and the Master was to be at liberty to state any special matters at the request of the parties.

In pursuance of this decree the Master made his report, and thereby found that, according to the *Dutch* law, which prevails in the colony of *Demerara*, upon a marriage without any ante-nuptial contract, a community

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munity of the real and personal estate of the husband and wife takes place; that the *Dutch* law does not permit or acknowledge, as valid, any kind of settlement made prior to the marriage; that the intervention of trustees, in such a deed, is a proceeding entirely unknown, and would make no difference, but would be considered merely as *in fraudem legis*; that the right of the husband and wife, during the coverture, must remain in the same state as they were fixed at the period of their union, that is to say, that a community of property and goods then immediately takes place between them; that neither the husband nor wife, either alone or together, can make any alteration whatever in that state of property by any settlement in favour of themselves or their issue; that no such settlement would be valid or binding; that, according to the said law, a real estate cannot be passed by deed only, but it is necessary that the transfer thereof should be passed and executed before the magistrates and the justices of the place where the property is situated; that the legal estate in the moiety of the Plaintiff *Maria Elizabeth Alleyne Martin* of the plantations and premises in the pleadings mentioned did not pass to the trustees by the deeds of lease and release, bearing date respectively the 21st and 22d of *January* 1806; that, by the law of *Demerara*, and in a case where there was no ante-nuptial contract, no contracts binding the wife's real property can be made, after marriage, between the husband and the wife, or between the husband and other parties as trustees for the benefit of the wife and children; that the inquiry whether, after a valid settlement for the separate benefit of the wife, with remainder to the children, the husband can renounce the benefit of it in favour of creditors, proceeded upon an assumption wholly unknown to the *Dutch* law; that, by such law, the only settlement which is permitted is termed an

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an ante-nuptial contract, the sole effect of which is to exclude community in respect of the property the subject of such settlement; that there is no mode of settling the property upon the children of the marriage by means of an ante-nuptial contract; that an ante-nuptial contract cannot be varied by the husband and wife in favour of each other, but the wife with the consent of the husband, or the husband with the consent of the wife, can mortgage or charge the settled property, or property excepted from the community, in favour of creditors or third persons, either for the purpose of paying off the debts of the husband, or of satisfying judgments to which the property was previously liable, or of purchasing, providing, or paying for stores and necessities supplied to plantations and estates situate in the colonies, and particularly in the colony of *Demerara*, and generally for the payment and satisfaction of any debts validly contracted; that as the *Dutch* law forbids women to become sureties, it is necessary, when a settlement has been made previous to marriage, and the wife is desirous of subjecting her separate property to the private debts of her husband, that she should, in the deed itself, expressly renounce the benefit of such law, without which the deed would not be valid and effective as to such property, but it is incumbent on the wife to prove that such charge or incumbrance was created on account or in respect of the private debts of the husband; and when the consideration is for necessities supplied for the support and maintenance of the wife and family, or for the supply of stores and provisions for the separate estate of the wife, it would not come within the rule. The Master further found, that, upon the marriage of the Plaintiff without any ante-nuptial contract, a community of the moiety of the plantation ensued, and thereupon *Anthony C. Martin*, assisted by his wife, or even alone, as the legal disposer of the property in community, was enabled, in favour of

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creditors or third persons, to vary and alter the state of the property, by any deed or act, for a valuable consideration; that such deeds, or acts, are valid and binding; that the effect of the community of goods is to form a common stock of the whole property, both moveable and immoveable, possessed by the husband and wife at the time of their marriage, or acquired subsequently, which common stock is liable to all debts and engagements of either party existing at the time of or contracted during the marriage by the husband, or by the wife with his concurrence; that *Anthony C. Martin* and the Plaintiff having become indebted to the Defendant's predecessors in trade, in considerable sums of money, the mortgage of the 1st of *September* 1815, passed under the authority of the powers of attorney executed by *Anthony C. Martin* and the Plaintiff his wife, and by *John Longden* and *David Milne*, was duly passed, in conformity with the law and practice of the colony, for the purpose of securing such sums of money; that the legal estate in the moiety of the plantation in question, by the law of *Demerara*, vested in the said *James Bell*, upon the 1st of *September* 1815, by means of the mortgage, and that thus the legal estate was then vested in the Defendant *James Christian Clement Bell* as the heir at law of *James Bell*. The Master further found, that by the law of *Demerara* there is a lien upon the estate for monies advanced for the support of a wife and her children, and for stores, supplies, and necessaries furnished for the estate; and that it made no difference, in this respect, that the estate was originally the estate of the wife, and had been excluded from community by means of an ante-nuptial contract.

The two causes now came on to be heard on further directions on the Master's report.

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Mr. *Tinney* and Mr. *Garratt*, for the Plaintiff.

Mr. *Bickersteth*, Mr. *Pemberton*, and Mr. *R. Roupell*,
for the Defendants.

On the part of the Plaintiff, it was contended that the validity of the incumbrances was to be tried by the law of *England*. The parties were resident here when the marriage took place and the settlement was made: the trusts of that settlement bound the property in the hands not only of the husband and wife, but of all who acquired interests in it with notice of the equitable rights to which it was subject. It was of no importance that *Bell* had got the legal estate; for the advances were made with full notice of the settlement, and the Defendants could not be permitted to use the legal estate to defeat the equitable interests of which they had notice before they advanced their money. The settlement contained an express provision that the plantation should be considered as personalty; and if a suit had been instituted to have the trusts of the settlement carried into effect, the Court would have directed the plantation to be sold. The Plaintiff had a right to that relief; and when the property was converted into money, the proceeds would be dealt with only according to the trusts of the settlement. The laws of *Demcrara* might determine in whom the legal estate was; but the law of *England* would not permit a party resident in *London*, who advanced his money with full knowledge of the settlement, to make use of that legal estate to annihilate the rights of the wife and children.

On the other hand, the Defendants insisted that to argue on the supposition that the plantation was bound by the trusts of the settlement, was to beg the whole question. The rights of the different persons in the
plantation

plantation must be governed by the law of the colony; and as by that law the settlement was inoperative, the trusts which it purported to create were a mere nullity, so far as the property in *Demerara* was concerned.

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It has been contended for the Plaintiff, that although no interest actually passed to the wife and children by the marriage settlement, yet the Court might have compelled a sale of the wife's moiety of the plantation, and a settlement of the money produced by the sale upon the wife and children: that therefore the wife had an equity effecting the estate; and that the Defendants, having full notice of the settlement, were bound by it equally with the husband, and could not by their act defeat the wife's equity. But it was admitted that no authority could be found directly applicable to the case.

The point raised by the Plaintiff does not appear to be of much importance to her interests; because if that point could be sustained, it seems by the Master's report that the considerations for the Defendants' securities would by the law of *Demerara* give them a lien upon the moiety of the plantation against the Plaintiff and her children, to the amount now claimed by the mortgagees.

I incline to think that if this moiety of the plantation were unincumbered, and a bill were filed by the wife for the sale of it, and for the investment of the money produced by the sale upon the trusts of the settlement, the Court might give the relief thus prayed, upon the ground that it would effectuate the actual purpose of the Court in directing the settlement. But the settlement as executed does, by the law of *Demerara*, in no manner affect the right and power of the

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the husband and wife over the estate, and leaves them with the same absolute ownership that they would have had, if there had been no settlement. The equity of the wife appears to me therefore not to be attached to the estate, but to the person of the husband, by reason of his contracts, and to give the wife a right only to claim an equivalent.

It is true that if the estate had not been encumbered, the proper equivalent would have been the sale of the estate, and the investment of the money upon the trusts of the settlement; and upon a suit for that purpose the equity of the wife would attach upon the estate; but not unto such bill filed, because another equivalent might have been provided by the Court. To illustrate this distinction, let it be supposed that the husband in this case had been the apparent owner of two estates of equal value, and had, under the direction of the Court, made a settlement of the estate *A.*, and the trustees of the settlement had afterwards been evicted of this estate by the defect of the husband's title. There can be no doubt that if the husband remained the owner of the estate *B.*, upon a bill filed by the wife, the Court would compel a settlement of the estate to the former uses, and the wife would then have an equitable interest in the estate *B.* But until such bill filed, the husband would remain the absolute owner of the estate *B.*, and could effectually sell or charge it, although the purchaser had full notice of the prior settlement of the estate *A.* and the eviction of the trustees from that estate, because the equity of the wife was personal to the husband, and did not attach upon the estate *B.* My opinion therefore in this case is, that here the equity of the wife attached only to the person of the husband, and not upon the estate, and that the Defendants the mortgagees, although having full notice, are not affected by that equity.

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IRVIN v. IRONMONGER.

THE suit was instituted for the purpose of carrying into effect the will of *Richard Ironmonger*, the material parts of which were in the following words: —

“I, *Richard Ironmonger*, &c., do make and publish these instructions as and for my last will and testament, until a more formal will shall be drawn and executed by me. I hereby direct all my debts, funeral and testamentary charges and expenses, to be fully paid and satisfied; and I direct that the wages of my servants living with me at my decease shall be paid, and that my executors shall pay to each of such servants one year's wages: and I hereby give, devise, and bequeath unto *Thomas James Mawc*, of &c., *Stephen Catley*, of &c., and *Barrett Taylor*, of &c., and their heirs and assigns, all and every the freehold, copyhold, and leasehold estates, and premises, with their and every of their respective rights, members, and appurtenances whatsoever, and wheresoever situate, and of any kind and description whatever, and all and singular the personal estate, stocks, funds, and securities, and all other my property whatsoever and wheresoever, which I shall die seised or possessed of or

Where freehold, copyhold, and leasehold estates are devised, subject to a general charge for the payment of debts, and the freeholds and leaseholds are subject to mortgages, and there is a descended freehold estate purchased after the will, the general personal estate not specifically bequeathed is first to be applied in payment of simple contract debts as far as it will extend, and the surplus of simple contract debts is to fall proportionally on the

entitled freehold, copyhold, and leasehold estates devised: then the specialty debts, including all mortgage debts, are to be satisfied out of the descended freehold estate as far as it will extend: and the surplus of such specialty debts is also to fall proportionally upon the freehold, copyhold, and leasehold estates devised.

And, furniture specifically bequeathed, ought to contribute to the payment of the debts proportionally with the devised real estates.

Where a testator gives an annuity to *A.* for life, payable quarterly, the first payment to be made within eighteen months after his death, the annuity does not commence till fifteen months from the death of the testator.

Where a testator gives an annuity to *A.* for life, and directs the first payment to be made within one month from his, the testator's, death, the annuity commences from the death of the testator; and though the first year's payment is to be made at the appointed time, the payment for the second year does not become due till the end of the year.

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entitled unto, upon trust, to pay to my dear wife, *Ann Ironmonger*, the sum of 300*l.* per annum, for and during the term of her natural life, the first year's annuity to be paid within one month after my death : and I direct that my said beloved wife shall have the use of all my furniture, plate, linen, books, china, glass, &c. &c. during her life ; but that in the event of her wishing to remove her residence to a distant country, I then direct that every accommodation be given as to the before-mentioned furniture, &c. ; but that it will be advisable to consult with the after-mentioned executors of this my will as to the best mode of granting the required accommodation without injury to the property or lessening its value in the estimation and calculation of the parties hereafter interested in the same ; my executors to have an inventory of the property which my said wife is to have the use of as aforesaid : and I give, devise, and bequeath to the said *Barrett Taylor* an annuity of 300*l.* per annum to be paid quarterly, so long as she shall continue a single woman, &c. ; but the said *Barrett Taylor* not to be allowed to assign or dispose of or anticipate the said annuity ; the first payment of the said annuity to be made within three calendar months after my death : and I give and devise to my sister *Sarah Slack*, wife of *John Slack*, of *Manchester*, an annuity of 60*l.* per annum, payable quarterly, during her life, free from the debts, control or interference of her husband, and her receipt to be a good discharge to my trustees ; and the said *Sarah Slack* not to be allowed to assign or dispose of or anticipate the said annuity ; the first quarterly payment to be made within eighteen calendar months after my death : I give to my sister *Dorothea Thompson* and *Frederick Thompson* her husband, and the survivor of them, an annuity of 100*l.*, payable quarterly, but the said annuity not to be assigned, disposed of, or anticipated ; the first quarterly payment to be made within eighteen calendar

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calendar months after my death." After various other bequests, the testator proceeded to dispose of the residue as follows: — "And as to all the rest, residue, and remainder of my estates, property (the *George and Blue Boar, Holborn*, in the county of *Middlesex*; the *Union Coffee House*, in *Cockspur Street*; two houses in *Richmond*, in *Surrey*; one at *Epsom*, in *Surrey*; one at *Worthing*, in *Sussex*; three houses in *North Street, Brighton*; one in *Ship Street, Brighton*; one by the *Market, Brighton*; one house in *Howe Road, Brighton*), and effects, and such of the before-mentioned property as may become lapsed and fall in, I give and bequeath such rest, residue, and remainder to my natural daughter *Jane Taylor*, having assumed the name of *Jane Irvin*, &c., and to her heirs; and to be assigned and paid over to her on her attaining the age of twenty-five years, or marrying with the consent of her guardians before she shall have attained the age of twenty-one years, for and during the term of her natural life; and upon and after her death, I do direct that the estates and property which I shall die possessed of, and in which she shall have a life interest from the moment of my death, shall be limited to the heirs of her body in strict settlement, with cross remainders over; and in the event of the said *Jane Taylor*, otherwise *Jane Irvin*, marrying before she shall have attained the age of twenty-one years, and without such consent, then the said *Jane Taylor*, otherwise *Jane Irvin*, shall only be entitled to an annuity of 300*l.* during her natural life, and the estates shall be limited to the heirs of her body as before directed; and the trustees to be at liberty to apply such parts of the rents and profits of such estates, for the maintenance and education of the heir at law of her body lawfully begotten, &c: and in the event of the said *Jane Taylor*, otherwise *Jane Irvin*, dying unmarried, or without issue, then I do direct that the said *Barrett Taylor* shall be paid a further annuity

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of 200*l.*, subject to the same conditions and restrictions as before directed, respecting the annuity of 300*l.*: and if the said *Jane Taylor*, otherwise *Jane Irvin*, shall marry with consent as aforesaid, and die without leaving issue of her body, then I do direct that the husband of such marriage shall have and be entitled to the rents and profits of the said estate, subject to the said annuities, for and during the term of his natural life; and from and after the death of the said *Jane Taylor*, otherwise *Jane Irvin*, without issue as aforesaid, and after the death of such husband, I give and devise all that my freehold estate, situate and being in *Holborn*, in the said county of *Middlesex*, unto my nephew, *John Slack*, for and during the term of his natural life; and from and after his decease I give and devise the same estate unto the heirs of his body, lawfully begotten, in strict settlement, with cross remainders over, subject to the payment by him of the sum of 200*l.* to each of his sisters, when they have attained the age of twenty-one years; and if the said *John Slack* shall die without issue of his body, lawfully begotten, then I give and bequeath the same estate in *Holborn* unto *Sarah Powlett Shawe*, for and during the term of her natural life; and from and after her death to the heir of her body lawfully begotten, in strict settlement, with cross remainders over; and from and after the death of *Jane Taylor*, otherwise *Jane Irvin*, without issue, as aforesaid, and after the death of such husband, I give and devise all those my estates and property at *Brighton* and *Worthing* in the county of *Sussex*, and *Epsom* and *Richmond* in the county of *Surrey*, unto the said *Sarah Powlett Shawe*, for and during the term of her natural life, subject to the payment by her of the sum of 200*l.* to each of the daughters of the said *John Slack* and *Sarah* his wife, when they have attained the age of twenty-one years; and from and after the decease of the said *Sarah Powlett Shawe*

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Shawe I give and devise the same estate to her heirs, in strict settlement; and if the said *Sarah Powlett Shawe* shall die without leaving issue lawfully begotten, then I give and devise the same estates and premises unto my said nephew, *John Slack*, for and during the term of his natural life, and from and after his death to his heirs of his body, lawfully begotten, in strict settlement, with cross remainders over; and from and after the death of *Jane Taylor*, otherwise *Jane Irvin*, and after the death of such husband as aforesaid, I give and devise all that my leasehold estate and premises, called the *Union Coffee House* in *Cockspur Street* in the county of *Middlesex*, held under the Crown, unto *Thomas Kettlewell*, the younger, of *Clapham*, in the county of *Surrey*, for and during the term of his natural life; and after his decease, to the eldest son or daughter of his marriage, living at his death; and if he shall die without issue, I give and devise the said leasehold estate and premises unto the said *Sarah Powlett Shawe*, for and during her life; and after her death I give and devise the said leasehold estate and premises unto her eldest son or daughter; and if the said *Sarah Powlett Shawe* should die without such issue, then I give and devise the same leasehold estate to my said nephew, *John Slack*, for and during the term of his natural life; and after his death I give the same to his eldest daughter: and provided the said *Jane Taylor*, otherwise *Jane Irvin*, *Sarah Powlett Shawe*, and my said nephew, *John Slack*, and *Thomas Kettlewell*, the younger, of *Clapham*, shall, respectively, die without issue lawfully begotten, then I give and devise and bequeath all the hereinbefore mentioned property and effects, to my friend, *Benjamin Taylor*, Esq., of *Calcutta*, in the *East Indies*, for and during the term of his natural life; and from and after his death I give and devise the same property and effects unto the heirs of his body lawfully begotten in strict settlement, with

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cross remainders over; and from and after the death of the said *Benjamin Taylor* without issue as aforesaid, I give and devise the same property and effects unto the Rev. *John Toplis* for and during the term of his natural life; and from and after his death, I give and devise the same property and effects unto the heirs of his body lawfully begotten, in strict settlement, with cross remainders over; and from and after the death of the said Reverend *John Toplis*, without issue as aforesaid, I give and devise the same property and effects unto *James Toplis* the elder, for and during the term of his natural life; and from and after his death, I give and devise the same property and effects unto the heirs of his body lawfully begotten, in strict settlement, with cross remainders over." He appointed his wife, *Ann Ironmonger*, his executrix, and *Thomas Kettlewell*, *James Lawson*, and *Thomas James Mawne*, his executors.

The bill was filed for the administration of the trusts of the will; and at the original hearing, a decree was made directing accounts and inquiries.

It appeared by the Master's report, that, at the time of making his will, and at his death, the testator was seised of freehold estates which were subject to mortgages, and of certain copyhold estates which were unincumbered, and was possessed of certain leasehold property which was in mortgage; that he also died seised of an unincumbered freehold estate, which he had purchased between the making of his will and his death; that he was indebted at his death by simple contract in a sum of £032*l.* 9*s.* 1*d.*, which exceeded the amount of his general personal estate, excluding the furniture given to the widow for life and the leasehold estate; and that he had no specialty debts other than those secured by mortgage.

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The cause now came on to be heard upon further directions.

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Mr. *Pemberton* and Mr. *Wright*, for the Plaintiff.

Mr. *Tinney*, for some of the Defendants.

Mr. *O. Anderdon*, for other Defendants.

A question was made as to the annuity of 300*l.* given to the widow ; it being contended on her part, that as the annuity commenced from the death of the testator, and the first payment was to be made at the end of one month from his death, all the future payments should in like manner be made in advance.

The MASTER of the ROLLS ruled that the annuity was to commence from the death of the testator, and the first year's annuity was to be paid in advance to her at the end of one month after the testator's death ; but that the language of the will did not warrant him to direct that the annuity, which might be due in future years, should in like manner be paid in advance.

A question was also made, as to the annuity of 60*l.* given to *Sarah Slack*, and the annuity of 100*l.* given to the testator's sister *Dorothea Thompson* and her husband.

It was submitted on the part of the annuitants that though the first payment was postponed, the annuities commenced from the time of the testator's death.

The MASTER of the ROLLS ruled that, the annuities being payable quarterly, and the first payment being directed to be made within eighteen calendar months after the testator's death, the annuities did not com-

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mence till fifteen months after the death of the testator.

The material questions were, in what order the different portions of the assets were to be applied in payment of the testator's debts, and whether the mortgaged estates were to pass *cum onere*.

Oneal v. Mead (a) was cited to show that each mortgaged estate must, in the hands of the persons to whom it was devised, bear its own burthen. But it was answered that that case was different from the present, because here all the estates which were in mortgage formed a part of a general mass of property which the testator had charged with his debts; and it was argued that after the general personal assets were exhausted, the different component parts of the mass, which the testator had charged with his debts, ought to contribute, in proportion to their respective values, to the discharge of the mortgage debts as well as of the other debts.

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The will begins with a direction that the testator's debts, funeral and testamentary charges and expenses shall be fully paid and satisfied: and this amounts to a charge of those debts and expenses upon the real estate, in aid of the personal estate. It then gives all the testator's freehold, copyhold, and leasehold estates, and all his personal estate (except his furniture, which he gives to his widow for life) to trustees in trust for the payment of certain annuities and legacies, and, subject thereto, in trust for the testator's natural daughter

(a) 1 P. Wms. 693.

daughter for life, with remainder to her children in manner therein stated; but, in certain events, the testator gives over his freehold, copyhold, leasehold, and personal estates to several different persons.

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The personal estate not specifically bequeathed is, therefore, in the first place, to be applied in payment of the simple contract debts, as far as it will extend; and the surplus of those debts, not satisfied by such personal estate, is by reason of the charge in the beginning of the will to fall proportionally on the freehold, copyhold, and leasehold estates, and on the furniture given to the widow for her life. The apportionment is rendered necessary by reason of the gift over of the property to different persons in the events specified. The descended freehold estate will, in the first place, be applicable to the discharge of the mortgage or specialty debts, and the surplus of such mortgage debts will also fall proportionally upon the freehold, copyhold, and leasehold estates devised by the will, and upon the furniture so given to the widow. For the purpose of ascertaining the amount of the proportion of simple contract debts, and of the specialty debts which will be to be borne respectively by each of the freehold, copyhold, and leasehold estates, and furniture, &c., it will be necessary that the Master should ascertain the value of each separate property, and should also ascertain the amount of the simple contract and specialty debts, which, according to the foregoing declaration, will fall upon each estate and upon the furniture. But inasmuch as it is only in uncertain events that these several properties will pass to different persons, it may not be useful at present to direct that the sums thus chargeable upon each separate property, for payment of debts, should be raised by sale or mortgage; and when the cause comes on again for further directions, some provisional arrangement may

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may perhaps be made for payment of the debts from one estate, without prejudice to the rights of the parties entitled over to each particular property, if the events which give them that title should arrive. The value of the furniture, subject to the widow's interest in it, will be a part of the general personal estate.

“ His Honor doth declare that the legacies and annuities given by the will of the testator are charged on the freehold, copyhold, and leasehold estates, which the testator was seised or possessed of at the date of his will: and his Honor doth declare that the first year's annuity given to *Ann Ironmonger*, the testator's widow, is to be computed from the testator's death, and payable in advance from the end of one calendar month from the testator's death, and the second year's annuity payable at the end of the second year from the testator's death, &c.: and his Honor doth declare that the annuity given by the will to the Defendant *Barrett Taylor*, commenced from the time of the testator's death, and ought to be paid quarterly; and that the annuity given by the testator to his sister, *Sarah Slack*, should commence from the end of fifteen calendar months from the death of the testator; and that the annuity of the testator's sister *Dorothea Thompson* and her husband, should commence from the end of fifteen calendar months from the death of the testator.” The decree then directed the freehold estate, which was conveyed to the testator after the date of his will, to be sold, and the money arising from the sale to be paid into Court; the accounts of the personal estate to be continued, and the sum due in respect of the personal estate to be paid into Court: “ And his Honor doth declare, that if the amount of the sums hereinbefore directed to be paid into Court shall be insufficient to pay the
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the amount of what may be found due for the costs of the parties, the sum of 2032*l.* 9*s.* 1*d.*, being the amount of the simple contract debts due from the testator, and the legacies and subsequent interest thereon, the devisees in trust are to be at liberty to raise the amount of such deficiency by a mortgage upon the freehold, copyhold, and leasehold hereditaments and premises, which the testator was seised or possessed of at the date of his will, such mortgage to be without prejudice to the rights of any of the parties interested under the testator's will: and his Honor doth declare that the freehold, copyhold, and leasehold estates which the testator died seised or possessed of, are proportionally liable for the amount of the mortgage debts due from the testator, as also for the amount hereinbefore directed to be raised for payment of the costs, debts, legacies, and interest."

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Reg. Lib. 1830. A. fol. 1839.

BARTON v. TATTERSALL.

Rolls.
Feb. 28.
March 18.

PHILIP JACOBS, deceased, had twice obtained his discharge under the acts for the relief of Insolvent Debtors, the first time in 1814, and again in 1820; but no dividend was paid under either insolvency to any creditor. *Jacobs* afterwards became possessed of considerable property, and died on the 8th of *July* 1827, having appointed the Defendant his executor. The Plaintiff was a creditor under both insolvencies, and also assignee under them: and he instituted this suit on behalf of himself and the other creditors of *Jacobs* for the administration of his estate.

Under the insolvent debtors' acts the insolvent is discharged with respect to debts due from him only to the extent of the sums stated by him in his schedule.

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The assets were sufficient to leave a considerable surplus, after payment of all his debts incurred subsequently to his second discharge under the Insolvent Act.

By the decree (a), made on the hearing of the cause by the Master of the Rolls, his Honor declared, that the surplus assets of the estate of *Philip Jacobs*, after the payment of his funeral expences and debts incurred since the last insolvency, were applicable, first, to the payment of his debts under the second insolvency, and then in payment of his debts under the first insolvency; and after directing the usual accounts of the personal estate and of debts and funeral and testamentary expenses and legacies, it was ordered that it should be referred to the Master to take an account of the debts due to the Plaintiff and the other creditors of the testator, under his insolvencies, according to the schedules thereof, and the Master was to cause advertisements to be published in the usual manner; and it was further ordered that the testator's personal estate not specifically bequeathed should be applied in payment of his debts and funeral expenses, in a due course of administration, and then in payment of his legacies.

In the schedule of creditors, filed by *Jacobs* under his first insolvency, Sir *Thomas Clarges* was included: the sum due to him was stated to be 108*l.* In fact, its true amount was 236*l.* 5*s.*; and Sir *Thomas* had claimed to prove that amount before the Master. But the Master, considering that he was bound by the decree not to admit a proof for more than the amount specified in the insolvent's schedule, had allowed Sir *Thomas's* claim only to the extent of 108*l.* There were other creditors in a similar situation.

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(a) 1 *Russ. & Mylne*, 237.

Sir *Thomas Clarges* now presented a petition in order to obtain a direction that the Master should allow to him and the other creditors of the insolvent, such sums as they might be able to prove were due to them, although larger than the amount of their respective debts as stated in the insolvent's schedule.

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Mr. *Tinney* commented on the provisions of the 53 G. 3. c. 102., particularly on the 10th and 19th sections, and referred to *Baker v. Sydee* (a), and *Taylor v. Buchanan*. (b)

The MASTER of the ROLLS.

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This is a petition by Sir *Thomas Clarges*, stating himself to have been a creditor of *Jacobs'* at the time of his first insolvency, for the sum of 236*l.* 5*s.*, although in the schedule then delivered by the insolvent, he was represented as a creditor for the sum of 108*l.* only; and stating further that the Master, to whom the cause was referred, had refused to admit him as a creditor under the decree for a larger sum than 108*l.*, and praying that the Master might be directed to allow to him and the other creditors under the insolvencies, such sums, larger than the amounts stated in the schedules, as they might be able to establish.

The Master, being directed by the decree to take an account of the debts due to the creditors of the testator under the insolvencies, according to the schedules thereof, the petitioner, whatever might be the opinion of the Court with respect to his claim under the insolvencies, could not regularly obtain the object of his petition as
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(a) 7 *Taunt.* 179.

(b) 4 *Barn. & Cress.* 419.

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the decree now stands; the Master being concluded, as to such debts, by the amounts stated in the schedule. I am of opinion, however, that the decree, as to that point, is properly framed. The case of *Baker v. Sydee* (a), decides that, under the Insolvent Acts which were in force at the time of the transactions in question, the insolvent was discharged only in respect of debts due to creditors named in the schedule; and the reasoning, upon which that judgment proceeds, appears to me to lead to the conclusion that, as to creditors named in the schedule, he was discharged only to the extent of the sums stated in the schedule to be the amount of the debts. In the subsequent case of *Taylor v. Buchanan* (b), it is expressly ruled that the discharge of the insolvent prevails only to the extent of the debt specified in the schedule; and it does not appear to me, that the Acts of the 1 G. 4. c. 119., and of the 3 G. 4. c. 123., which passed in the interval between the two cases, make any difference in this respect. If, therefore, the petitioner is able to establish any demand against the testator's estate, it must be as a general creditor, and not under the insolvencies.

Let the petitioner go before the Master, to make such claim in that character as he may be advised; and reserve the costs of this petition, until the Master has made his report upon that claim.

(a) 7 Taunt. 179.

(b) 4 Barn. & Cress. 419.

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HANROTT *v.* CADWALLADER.

ROLLS.
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IN this case a bill was filed by the husband and wife and their trustee, to give effect to a deed by which the wife, who had become entitled to a certain sum of money to her separate use, had assigned it to the trustee upon trust, as to a large part of it, for her husband. The deed was executed after a separation had taken place between the husband and wife. It was stated in the bill, but was not proved. The cause was now heard as a consent cause.

The bill of the husband and wife, where it seeks relief in favour of the husband to the prejudice of the wife's interest, is considered by the Court as the bill of the husband alone.

The circumstances being stated, the Master of the Rolls declined to make a decree on the pleadings as they stood; observing that this was not a case in which proof of the deed could be dispensed with (*a*), or in which the Court could act upon the mere allegation of the bill.

In such a case the proper course is to make the wife a defendant.

His Honour added that it was a misapprehension of the principles of the Court to suppose, that, because the wife was joined as a co-plaintiff, the Court would act against her interest for the benefit of the husband, without proof of the instrument under which the Plaintiff claimed; that the Court considered that the bill of the husband and wife was the bill of the husband alone; and that in this case the proper course would be to make the wife a Defendant in order that it might appear upon her answer, that she admitted the deed to have been fairly obtained, and that she had, at the time of executing

If there were no deed, and it was simply the case of a wife consenting that the husband should receive money which was given to her, then the wife's consent in court would be sufficient, without altering the form of the pleadings.

(*a*) *Ryan v. Anderson*, 3 *Mad.* 174.

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executing it, full knowledge of her rights in the property assigned. If there were no deed to be established in this case, and it was simply the case of a wife consenting that the husband should receive her money, then the wife's consent in Court would be sufficient without altering the form of the pleadings.

ROLLS.
March 22.

READ v. BACKHOUSE.

Where a testator makes a codicil without professional assistance, his expressions are not to be construed literally and technically, if upon the whole instrument it appears that he meant to use them in a different sense.


THE testator, *Thomas Backhouse*, made his will, dated the 21st of *May* 1783; and thereby "as to all his estate whatsoever, he gave and devised all and every the messuages, lands, tenements, tithes, rents, and hereditaments whatsoever, as well freehold as copyhold, whereof or wherein he, or any other person or persons in trust for him, had or was entitled to any estate of freehold or inheritance in possession, reversion, or remainder, or expectancy, unto his friends *John Read* and *James Bouchier*, and their heirs, to the uses, upon the trusts, and for the in-

tents

A testator by his will devised all his real estates to trustees, upon trust for his son during his life, with remainder to the son's children in strict settlement, and, for default of such issue, to the testator's brother for life, remainder to *Robert* in tail; and he gave the residue of his personal estate to the same trustees, on trust, subject to two annuities, for the children of his son, and failing them, for his brother for life, and after his death, for *Robert* absolutely. The brother died; and the testator afterwards made a codicil, by which, after reciting that in case his son should die without an heir male or female, he had bequeathed his estates in the parish of *Missenden* and elsewhere to *Robert*, he revoked that part of his will, and excluded *Robert* from all chance of benefit under the will, and in the place of *Robert*, he, if his son should die without heirs male or female, bequeathed all the estates he had or might have at the time of his death in *Missenden* or elsewhere, which by virtue of his will were the sole property of his son, to *Thomas* and the heirs of his body, subject to the same conditions of entail as were imposed on the son; and in case *Thomas* died without heirs, he bequeathed all the estates which *Thomas* would inherit by the death of the testator's son, to *Jacob* and his heirs, subject to the payment of the testator's debts and annuities: Held, that the gift of the residue of the personal estate to *Robert* was revoked, and that this residue was not undisposed of, but was given to *Thomas*.

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tents and purposes, and with and subject to the powers, provisos, and declarations thereafter limited, declared, and expressed, of or concerning the same; that is to say, as to, for, and concerning his two small tenements, situate to the south end of his messuage in the town of *Great Missenden*, then in the several occupations of *Thomas Moore* and *Solomon Buckley*, and likewise the orchard adjoining, containing by admeasurement one acre, to the use of *Dorothy Hill*, second daughter of *Richard Hill*, late of *Wrexham* in the county of *Denbigh*, Esq., deceased, and her assigns, for and during her life; and as to, for, and concerning the said two tenements and orchards, from and immediately after the decease of *Dorothy Hill*, and as to, for, and concerning all other the messuages, lands, tenements, tithes, rents, and hereditaments and premises thereinbefore devised, from and immediately after his own decease, to the use of his natural and beloved son *Thomas Joseph Backhouse*, who was born on the 27th of *January* 1764, in the city of *Manilla*, upon the island of *Luconia*, and then was a lieutenant in his Majesty's service, and his assigns, for and during the term of his natural life, without impeachment of waste;" and, from and after the death of his son, he limited the estate in strict settlement to the first and other sons of the body of his son, with remainder to the daughters of his son as tenants in common, and, in default of such issue, to the use of his brother *Jacob Backhouse* and his assigns, for and during his life, without impeachment of waste; and from and immediately after the decease of *Jacob Backhouse*, to the use of his nephew *Robert Backhouse*, second son of *Jacob Backhouse*, and the heirs of his body issuing, and for default of such issue, to the right heirs of his brother *Jacob Backhouse* for ever. The will contained the usual powers of leasing and jointuring. The testator then gave "all his household goods, furniture, pier and other glasses, linen,

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pictures, prints, plate, china, and books, which should be in or about his house at *Great Missenden* or any of the offices thereunto belonging, at the time of his decease, to the person or persons who for the time being should be entitled to his said house, to the end and intent that the said household goods and furniture, pier and other glasses, linen, pictures, prints, plate, china, and books might go therewith as heir-looms, and be used and enjoyed with his house, so long as the rules of law or equity would permit." And, after giving certain legacies, "as to all the residue of his personal estate whatsoever, not thereinbefore specifically devised, which should remain after payment of his debts and funeral expenses, and the several specific and pecuniary legacies or sums of money thereinbefore given, and such legacies as he should at any time or times thereafter give by any codicil or codicils to the will, he gave and bequeathed the same and every part thereof unto *John Read* and *James Bouchier*, their executors, administrators, and assigns, upon trust, that they and the survivor, his executors, administrators, and assigns, should from time to time lay out and invest or continue such residue of his personal estate and effects in the public stocks or funds, or on government or real securities at interest; all which stocks, funds, or securities might be from time to time sold, assigned, transferred, altered, and varied, and the money thereby arising or coming to their or his hands again laid out, or invested, in or upon such new or other stocks, funds, or securities, when and so often as they or he should think fit:" And he directed, "that *John Read* and *James Bouchier* and the survivor of them, their executors, administrators, and assigns should stand and be possessed of, and interested in, the said residue of his personal estate and effects, and the stocks, funds, and securities wherein or upon which the same, or any part or parts thereof, should be laid out and invested

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or continued, upon the trust and to the intent and purpose that *John Read* and *James Bouchier* and the survivor, his executors, administrators, or assigns should, out of all the dividends, or interest, or annual produce of the same stocks, funds, and securities," pay two annuities, one to *Dorothy Hill*, and the other to *Maria Arnold*: "And as to, for, and concerning all the said stocks, funds, and securities wherein or upon which the residue of his personal estate should be laid out or invested or continued, subject nevertheless to the said yearly payment so thereby directed to be made thereout to the said *Dorothy Hill* and *Maria Arnold* respectively, during their lives, he directed that the said *John Read* and *James Bouchier* and the survivor of them, his executors, administrators, and assigns should stand and be possessed of and interested in the said stocks, funds, and securities, upon trust, in case there should be any child or children of his said son *Thomas Joseph Backhouse*, living at the time of his son's decease, or born within due time afterwards, to transfer the same stocks, funds, and securities unto and amongst all and every such his child and children, equally, share and share alike; and to be transferred or transferable in manner and at the time therein specified, that is to say, to sons at twenty-one and to daughters at twenty-one, or marriage, which should first happen; and in case there should not be any child or children of *Thomas Joseph Backhouse* living at the time of his decease, or born in due time afterwards, or, being such, all of them, being a son or sons, should die before he or they should attain his or their ages of twenty-one years without having been married, then in trust that they the said trustees and the survivor of them, his executors, administrators, and assigns should stand possessed of and interested in the whole of the residue of his personal estate and effects, and of the funds and securities wherein

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or upon which the same, or any part or parts thereof, should be laid out or invested or continued as aforesaid, or so much thereof as should not have been sooner advanced and applied as aforesaid, upon trust to pay, apply, and dispose of all the dividends and interest or annual produce of the same stocks, funds, and securities, which should remain after payment of the said yearly payments so thereinbefore directed to be made thereout unto *Dorothy Hill* and *Maria Arnold* respectively, during their respective lives as aforesaid, unto and for the use and benefit of his brother *Jacob Backhouse* and his assigns, for and during his natural life; and from and immediately after his decease, then upon trust to transfer, assign, and pay the whole of the stocks, funds, and securities unto his nephew *Robert Backhouse*, to and for his own absolute use and benefit; provided always, that it should be lawful for the said *John Read* and *James Bouchier* and the survivor of them, his executors, administrators, and assigns, in case he or they should so think fit, at any time during the life of his said son, *Thomas Joseph Backhouse*, to lay out any part of the said residue of his personal estate in the purchase of a company in any of his Majesty's regiments, for the benefit and promotion of his son, any thing thereinbefore contained to the contrary thereof in any wise notwithstanding."

Jacob Backhouse, the brother, having died, the testator afterwards made the following codicil: "This is a codicil of me *Thomas Backhouse*, wrote with my own hand and sealed with my arms; and it is my will and desire that this my codicil shall have full force and power, as all other good and lawful instruments made by the strictest forms of law, bearing date this 10th day of *November* 1796." After giving directions as to the disposal of his remains after his decease, the
codicil

codicil proceeded as follows : “ Whereas in my last will and testament I have ordered and willed that, in case my son *Thomas Joseph Backhouse* (now a major in his Majesty’s 47th regiment) should happen to die without an heir male or female, that, in such case, I have bequeathed my estates in the parish of *Great Missenden* and elsewhere to my nephew *Robert Backhouse*, this part of my last will and testament I revoke, annul, and set aside, and I exclude him, the said *Robert Backhouse* my nephew and his heirs from any chance of benefit from my last will and testament, made by *Thomas Goostrey*, Esq., attorney at law ; and in the place of the said *Robert Backhouse* my nephew, if my said son *Thomas Joseph Backhouse* unfortunately shall happen to die without heirs male or female, in such case I give and bequeath all the estates that I now have, or may have at the time of my decease, in the parish of *Great Missenden* in the county of *Bucks*, or elsewhere, which by virtue of my last will and testament were the sole property of my dear son *Thomas Joseph Backhouse*, to *Thomas Backhouse*, son to my nephew *Jacob Backhouse*, an infant, now living with his father at *Wigton*, in the county of *Cumberland*, and to the heirs of his body lawfully begotten, for ever ; subject, nevertheless, to all and every condition which are stated and enforced by my said last will and testament upon my son *Thomas Joseph Backhouse* with regard to entail, and every other clause which my said son was bound to fulfil and observe by virtue of my last will and testament ; and in case my said relation *Thomas Backhouse*, now an infant, shall happen to die without heirs, in such case I give and bequeath all my estates, which he inherited by the death of my said son, to my nephew Mr. *Jacob Backhouse* and his heirs for ever ; subject, nevertheless, to the payment of all just debts and annuities which are not revoked in this my codicil.”

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The testator's son, *Thomas Joseph Backhouse*, died without children.


The question in the cause related to the disposition of the residuary personal estate.

Thomas Backhouse and *Jacob Backhouse* contended that the codicil revoked the gift of the residue to *Robert*, and had given it to *Thomas*, and, in the event of his death without children, to *Jacob*. The next of kin agreed with these parties in saying that the gift to *Robert* was completely revoked; but they alleged that there was no valid disposition of the residue to any other person, and that it went, therefore, according to the statute of distributions. The representatives of *Robert* insisted that the revocation was confined to the devise of the real estate to *Robert*, and did not extend to the residue of the personalty.

Mr. *Bickersteth* and Mr. *Rogers*, for *Thomas Backhouse*.

The testator by his will, in the event of his son dying without leaving children, had given both his real and his personal estate to his nephew *Robert*. The language of the codicil is an express revocation of both gifts. When the testator tells us that he excludes *Robert* from any chance of benefit from his last will, he necessarily excludes him from the residue of the personalty. He proceeds; "and in the place of the said *Robert Backhouse*, my nephew, if my son *Thomas Joseph Backhouse* unfortunately shall happen to die without heirs male or female, in such case I give and bequeath all the estates that I now have or may have at the time of my decease, in the parish of *Great Missenden*, in the county of *Bucks*, or elsewhere, which by virtue of my last will and testament were the sole property of my dear son *Thomas Joseph Backhouse*, to *Thomas Backhouse*,

house, son to my nephew *Jacob Backhouse*." The introductory words of the clause manifest an intention to substitute *Thomas* for *Robert*; and there being in the mind of the testator a clear purpose not merely of revocation but also of substitution, the substitution must be held to extend to the whole subject of the gift, if the words will fairly bear that construction. It is true that the testator has described the subject, which he gives to *Thomas*, as "all the estates that I now have or may have at the time of my decease in the parish of *Great Missenden* or elsewhere." But such words may either be confined to real estate or extend to personalty according to the general tenor of the codicil; *Doe v. Tofield* (a); and, from the mode in which similar words are used in the clause revoking the gift to *Robert*, it is manifest that the testator considered them as comprehending all that was included in that gift. Besides, the subject, which by the concluding clause of substitution is given to *Jacob*, clearly includes the personalty; for it includes the fund out of which the debts and annuities were to be paid: and it is identical with the fund, which, by the previous substitution, was given to *Thomas*. The codicil, therefore, though incorrect in its language, contains a sufficient expression of the testator's intention that, in the events which have happened, *Thomas* should take the residue of the personal estate.

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Mr. *Tinney* and Mr. *Parry* followed the same line of argument.

Mr. *Pemberton* and Mr. *West*, for the representatives of *Robert Backhouse*.

The revocation of the gift to *Robert* is said to be for the purpose of substituting *Thomas*: the extent of the
 revocation,

(a) 11 *East*, 246.

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 BACKHOUSE

revocation, therefore, will be best determined by ascertaining how much is given to *Thomas*. The words of the gift to *Thomas* are such as in themselves are properly applicable only to real estate. They expressly describe what is given to him as being that which, under the will, would be the sole property of the testator's son; and there is an express direction that the gift to *Thomas* should be subject to the same conditions of entail as had been imposed on the son. Now under the will the son took only the real estate; in the personalty, he had not even a life interest given him; after his death it was limited to his children. It is, therefore, impossible to contend that *Thomas* is substituted as the residuary legatee of the personal estate; and the revocation of the gift to *Robert* ought not to extend beyond what is given to *Thomas* in his stead. At all events, if *Robert* does not retain the personalty, it must go, not to *Thomas*, but to the next of kin.

Mr. *Matthews* and Mr. *Hayter*, for the next of kin.

The MASTER of the ROLLS.

The question in this cause is, whether, by the effect of the codicil, the testator's great-nephew *Thomas Backhouse* is substituted in the place of the nephew *Robert Backhouse* mentioned in the will to the residuary personal estate, as well as to the real estates thereby devised.

The codicil is obviously written by the testator himself, and is not to be construed literally and technically. The testator, after reciting that by his will he had given his estates in *Missenden* and elsewhere to his nephew *Robert Backhouse*, in case his son should die without issue, revokes that part of his will, and excludes his said nephew from any chance of benefit from his will.

He

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v.
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He had, in fact, given to his said nephew, in the event stated, no other estate than that of *Missenden*; but he had also in that event given to him his residuary personal estate; and when he proceeds in plain terms to exclude his said nephew from any chance of benefit under his will, the inference is irresistible, that he means to exclude him from the residuary personal estate, and that he uses the term “elsewhere,” however inaccurately, to express that intention. After having thus excluded the nephew *Robert* from every chance of benefit under his will, in the place of his said nephew, he gives and bequeaths all the estates which he has or may have at his death, at *Missenden* or elsewhere, in the event stated, to *Thomas Backhouse*; plainly meaning an entire substitution of *Thomas* for *Robert*, and again expressing his intention as to the personal estate by the word “elsewhere.” In a subsequent part of the codicil, he declares that if *Thomas* should die without heirs (meaning children), he gives all his estates, which *Thomas* was to inherit by the death of his son, to his nephew *Jacob Backhouse*, subject, nevertheless, to his just debts and annuities, which are not revoked by his codicil. Now the just debts and annuities are expressly charged by the will upon the personal estate; and as he plainly means that *Jacob*, who is substituted for *Thomas*, is to take the estate which is subject to the payment of the debts and annuities, it is clear that here he uses the word “estates” as comprising both real and personal estate.

A difficulty is interposed by the direction that the nephew *Thomas* is to take the estates at *Missenden* and elsewhere, which were to become the property of *Thomas Joseph Backhouse*; and it is said that by the will the son takes no interest in the residuary personal estate.

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It is true that in the will there is no direct gift of the personal estate to the son; but the personal estate is not by the will given over to the son's children, till after the death of the son; and the trustees are directed to apply as much as might be necessary of the personal estate in the purchase of promotion for the son in the army: and, if there is any slip in the will which would deprive the son of this personal estate, there is enough in the codicil to manifest that the testator considered that his son would take the personal estate under the will, which is all that is necessary for the present purpose.

My opinion, therefore, is, that *Thomas* is by the intention of the testator plainly substituted in the place of *Robert* as to all the benefits given to *Robert* by the will.

1831.

DUNK v. FENNER.

Rolls.
March 25.
April 18.

THE testator *Thomas Funnell* made his will, dated the 8th of *February* 1811, in the following words: —
“This is the last will and testament of me *Thomas Funnell*, in the parish of *Bexley* in the county of *Kent*, tanner. First, I nominate and appoint *Joseph Fenner* of, &c., *James George Petre* of, &c., and *Dean Rayner Pike* of, &c., the executors of this my will; and I also desire them to accept of 20*l.* each, as a token of my friendship, to buy mourning. It is my will that, at the decease of either of my executors, the two survivors shall choose a third to assist them, and so, in perpetual succession, a third shall be chosen by two survivors till the whole of my will is executed. My just debts, funeral expenses, incidental charges, and probate of this my will being paid, I give the sum of 100*l.* with interest commencing at my decease to my friend *James Skinner*, of *Cranbrook* in the county of *Kent*, and his heirs. I give and devise to my said executors, and to him or them who may be chosen by survivors as above stated,

A testator by his will devises all his real estate to his executors for the purposes therein-after stated; and, after empowering them either to continue his business or to dispose of it, he gives the profits of it in the one case, and the interest of the monies arising from the sale in the other, and also the interest of the securities on which the rest of his capital should be invested, to his daughter for life, her receipt to be

a discharge. He then gives her the rents and profits of all his real estates during her life; and at her decease he devises and bequeaths to her heirs all his estates real and personal as tenants in common: if his daughter has but one child. such child is to possess the whole; but if she should die without issue, then at her decease he gives certain legacies. He next directs all his goods and effects to be sold, his said legacies to be paid, and a sum invested sufficient to purchase 150*l.* a year, which is to be paid to the husband of the daughter. He then orders his real estates to be sold at the decease of his daughter or at the decease of his brothers and sisters, according as a particular event may turn out; and he gives over to certain persons all the residue of his personal estate, including the proceeds of the sale of the real estates when sold, and the rents of them until they are sold. The daughter died without having had issue: Held,

That the daughter took an estate tail in the freeholds;

That the real and personal estate being given over together, she took the personal estate absolutely;

That the annuities and legacies given at her decease were charged both on the real and personal estate, and were to be borne proportionally by the two funds.

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 O.
 FENNER.

stated, all and singular my lands, houses, tenements, buildings, and appurtenances of what nature or kind soever and wheresoever, to hold the same in trust for the purposes hereinafter stated. It is my will that my business shall be continued under the inspection of my executors, while they shall judge that the property which I may die possessed of will not be diminished. I do hereby empower my executors, so long as the trade shall be carried on, to inspect the stock in trade, and all the accounts which relate thereto, whenever they shall think proper; and when they shall think there is danger of sinking money by the said trade, it is my will that they shall dispose of to the best advantage. The profits of my said business I give to my daughter *Elizabeth Jarman*, for and during the term of her natural life, if the said trade should be continued so long; but if not, then the money arising from the disposal shall be invested by my executors in good and safe security, and the interest arising therefrom shall be paid half-yearly, and every half year, to my said daughter for the term above stated. The capital also that I may die possessed of, over and above my stock in trade, shall be also invested in good and safe security, and the interest of this surplus shall be likewise paid to my said daughter in manner and for the time above stated; and her receipt for the whole interest shall be a proper discharge for my executors for the payment of the said interest for the term of her natural life. I also give to my said daughter all the rents and profits of all and singular my real estates, whatsoever and wheresoever, for the term of her natural life; and at my said daughter's decease I give, devise, and bequeath unto her heirs all and singular my estates, real and personal, to be equally divided among them; and they shall take my real estates as tenants in common and not as joint tenants. Should my daughter have but one child, such child shall possess the

the whole; but if my daughter should die without issue, then at her decease I give unto my brothers-in-law *William* and *Henry Cheeseman* 200*l.* each; and to my sister *Elizabeth Dunk*, and my nephews *Richard, Thomas,* and *John Dunk*, and to my niece *Mary*, wife of *John King*, 100*l.* each. I also give to *Daniel Jarman* my son-in-law 1000*l.* At my daughter's decease without issue, all my goods and effects of every kind shall be sold, and the said legacies paid, and a sum sufficient to produce 150*l.* a year shall be invested by my executors in good and safe security; the interest, that is to say, the said 150*l.* shall be paid to my said son-in-law in half-yearly payments, one moiety every half year, for and during the term of his natural life. At my daughter's decease without issue, all my real estates shall be sold to the best advantage, unless they can be let so as to produce an annual sum equal to what the money would produce at interest were my said estates disposed of, in which case they shall not be sold till the decease of my brother and sisters as hereinafter stated. All the rest and residue of my personal estate, including that which arises from my real estates, should they be sold at my daughter's decease, shall be likewise invested by my executors in good and safe security, and the interest arising therefrom shall be divided into four equal parts. Should my real estates remain unsold, then the interest arising from the said residue of my personal estate, and all the rents and profits of my real estate, shall be united, and divided into four equal parts; and in either case I give one fourth part to my brother *John Funnell*, another fourth part to my sister *Elizabeth Dunk*, another fourth part to my sister *Philadelphia Kine*, to be paid to them half-yearly, and every half year during the lives of my said brother and sisters; and at the decease of either of them, the said three parts shall be equally divided and paid

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paid to the two survivors, in the manner above stated, till the decease of a second of my said brother and sisters, and then the said three parts shall be paid to the survivor for and during the term of his or her natural life. The remaining half moiety I give to my nephew *William Body*, and my nieces *Sarah Crowhurst* and *Ann Body* and their heirs, in equal shares, to be paid in like manner till the decease of my said brother and sisters. If my said son-in-law should die before my said brother and sister, then his annuity of 150*l.* shall be added to the said four parts, and shall be distributed exactly in the same manner; and at the decease of my said brother and sisters, my son-in-law being dead, the money that produced his annuity, together with the money which produced the said four parts, including the rents and profits of my real estates, shall be aggregated, and if any of my real estates remain, they shall be all sold. The aggregate sum shall then be equally divided among my nephews and nieces, the children of my brother *John Funnell*, and my sisters *Sarah Body*, *Elizabeth Dunk*, and *Philadelphia Kine*; and if one or more of my said nephews and nieces should die leaving issue, such issue shall possess the share of their parents respectively. Should my son-in-law survive my said brother and sisters, then at his decease, and not before, shall the sum, which produced his annuity, be distributed among my said nephews and nieces exactly in manner above stated."

The testator died on the 11th of *November* 1812. His daughter *Elizabeth Jarman* died in *June* 1820, without having had issue, leaving her husband *David Jarman* her surviving.

The bill was filed for the purpose of carrying the trusts of the will into effect; and three questions were raised in the cause:—

First,

First, what interest *Elizabeth Jarman* took in the testator's real estate.

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Secondly, what interest she took in the personal estate.

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Thirdly, whether the real estate was charged with the annuity of 150*l.* given to *Daniel Jarman*, and the legacies payable at the decease of his wife; and, if so, whether the charge on the real estate was only in aid of the personalty, so that the personal estate was the first fund for paying them, or whether the real estate and the personal estate were to bear the burden rateably.

Mr. Bickersteth and *Mr. Randall*, for the plaintiffs.

The daughter did not take an estate tail in the lands: she took only an estate for life, with contingent limitations to her children as tenants in common, if she left children at her decease; and if she did not leave children, then for the particular purposes expressed in the will. The gift to her is, in words, only for the term of her natural life. The devise to her heirs, which immediately follows, is a distinct gift: it is not a limitation showing the extent of the devise to her, but a new devise to them as purchasers; and the proviso, that if his daughter leaves but one child, that child shall have the whole, shows that the testator used the word heirs to denote children. It will be contended that the next words—"but if my daughter should die without issue"—denote an indefinite failure of issue, and will therefore give her an estate tail. We answer, that the context shews that they denote not an indefinite failure of issue, but merely a failure of issue at her death; for the testator immediately proceeds, "then at her decease, &c.;" and he gives various legacies which are to be *then* payable, and makes a complete disposition, which is to have effect at her decease.

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Furness.**

Her death, therefore, is the point of time when the property is to take one course of devolution or another, according as she does or does not leave children.

There are two distinctions between *Jesson v. Wright* (a) and the present case. First, in *Jesson v. Wright* there were no words to give an estate of inheritance to the children of the first devisee for life; and the question was, whether the first devisee should take an estate for life, with remainder to his children for life, or whether he should be held to take an estate tail, so that the lands might not go over, so long as there existed any person included in the line of issue, upon the failure of which alone the ultimate limitation was to take effect. Here the devise is "of all the testator's real estates;" so that the children of the daughter, though taking as purchasers, will take the fee. Secondly, in *Jesson v. Wright* the limitation over was only upon an indefinite failure of issue: here it is upon failure of issue at the decease of the daughter.

Were the words such as to have given the daughter an estate tail in the freeholds, the technical rules and the authorities, on which alone that construction could be tenable, are not applicable to the personal estate; and, with respect to that fund, the Court will carry into effect the clear intention of the testator, giving her only a life interest in it, and applying it, from the time of her decease, in the manner directed by the will; *Forth v. Chapman* (b), *Jacobs v. Amyatt*. (c) To give the daughter an absolute interest in the personal estate would be quite inconsistent with the discretionary power of carrying on the trade which is conferred on the trustees.


The legacies given at the death of the daughter, and the annuity of 150*l.* which her husband then takes, were intended

(a) 2 *Bligh*, 1. (b) 1 *P. Wms.* 663. (c) 4 *Bro. C. C.* 342.

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intended to be paid out of the personal estate. After bequeathing the legacies, the testator directs as follows: —
 “All my goods and effects of any kind shall be sold, and the said legacies paid, and a sum sufficient to produce 150*l.* a year shall be invested by my executors in good and safe security; the interest, that is to say, the said 150*l.* shall be paid to my said son-in-law, in half-yearly payments.” It is from the sale of his goods and effects that the legacies are to be discharged, and that an investment is to be made to meet the annuity. He then proceeds to direct the sale of his real estates; and he gives the residue of his personal estate, that is, the residue after payment of the legacies and the annuity, (including the whole proceeds of his real estates,) upon certain trusts unconnected with the legacies or annuity. The legacies and annuity, therefore, are not charged on the real estate; at all events they can be charged on it only in aid of the personalty, and in case the primary fund should be found insufficient.

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Mr. *Lee*, for a defendant in the same interest, insisted on similar topics of argument. In *Trotter v. Oswald* (a), a testator gave the residue of his property, real and personal, to trustees, in trust, “for the use of *John Bogle*, during his life, and to the lawful heirs of his body after his demise, but in case of his dying without issue of his body, after his decease I give all such residue to *John Oswald*” It was held that these words created a contingency with a double aspect, and that in the event of *John Bogle* leaving no child, the limitation to *John Oswald* would take effect. Mr. *Lee* also cited the following authorities: *Goodright v. Dunham* (b), *Burnsall v. Davy* (c), *Gretton v. Haward* (d), *Doe v. Webber* (e), *Doe v. Frost*,

(a) 1 *Coz.* 517.

(d) 6 *Taunt.* 94.

(b) 1 *Doug.* 261.

(e) 1 *Barn. & Ald.* 713.

(c) 1 *Bos. & P.* 215. 6 *T. R.* 30.

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v. *Frost* (a), *Robinson v. Robinson* (b), *Doe v. Cooper* (c),
Doe v. Goff (d), *Porter v. Bradley* (e), *Pinbury v. El-*
kin (g), *Wilkinson v. South* (h), *Rackstraw v. Vile.* (i)

Mr. *Williams* and Mr. *Elderton*, for other defendants
in the same interest.

Mr. *Lynch* for *Daniel Jarman*, who was the personal
representative of his deceased wife.

The daughter took an estate tail in the freeholds.
They were not to go over, unless upon a general failure
of her issue; and there is no mode in which the words
of this will would, in every event, have carried the whole
of the freeholds throughout the whole line of her issue,
except by giving her an estate tail. *Jesson v. Wright* (k)
decides that a gift to A. for life, and if he dies without
issue, then over, is, in legal effect, an estate tail in A.;
and that such a devise shall have its legal effect, notwith-
standing inconsistent words in the context, unless it is
very clear that the testator meant otherwise. (l) Here
not only is it not clear that the testator meant other-
wise; but the supposed intention, for the sake of which
technical words are to lose their effect, is one which he
cannot reasonably be supposed to have entertained. For
according to the construction contended for on the other
side, if the daughter had died leaving children, all of
whom died in her lifetime leaving issue, the grand-
children would have taken nothing; and the property
would have gone in the manner directed by the limit-
ations

(a) 3 *Barn. & Ald.* 546.

(b) 1 *Burr.* 38. 2 *Ves. sen.*
225.

(c) 1 *East*, 229.

(d) 11 *East*, 668.

(e) 3 *T. R.* 143.

(g) 1 *P. Wms.* 563.

(h) 7 *T. R.* 555.

(i) 1 *Sim. & Stu.* 604.

(k) 2 *Bligh*, 1.

(l) 2 *Bligh*, 56, 57.

ations over. *Doe v. Harvey* (a), *Doe v. Goldsmith* (b),
Bennett v. The Earl of Tankerville. (c)

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The realty and the personalty being included in one and the same gift, if the daughter took an estate tail in the former, she took the latter absolutely; *Donn v. Penny.* (d)

If the daughter took the personalty absolutely, it would not be very consistent with that construction to say, that she took it subject to legacies and an annuity which were not to arise until after her death. But at all events the legacies and annuity are charged on the real estate, as well as on the personalty; *Bench v. Biles* (e), *Cole v. Turner* (g); and the real estate being given to the trustees for the purposes thereafter expressed, and both funds being comprised in the same gift over, the real estate must at least contribute to the burden in the proportion of its value.

Mr. Beames, for the trustees.

Mr. Bickersteth, in reply.

The MASTER of the ROLLS.

April 18.

It is properly admitted that as to the real estate, this case must be governed by the judgment of the House of Lords in *Jesson v. Wright*, unless there be found a substantial distinction between the two cases. But it is contended that there is such substantial distinction; because in *Jesson v. Wright*, if it were held that the children took

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(a) 4 *Barn. & Cress.* 610.

(d) 19 *Ves.* 544.

(b) 7 *Taunt.* 209.

(e) 4 *Madd.* 187.

(c) 19 *Ves.* 170.

(g) 4 *Russ.* 576.

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as purchasers, they could take for life only, and that in this case, the children, if purchasers, would take in fee, by reason that the testator here in the gift uses the expression, "all his estates real and personal," which expression, it is said, would carry a fee in his real estate. I am of opinion that, if the fee in the real estate did pass by this expression, it would not make a substantial distinction between this case and that of *Jesson v. Wright*. The gift here to heirs of the daughter is, by the limitation over, in case she should die without issue, to be read as a gift to the heirs of the body of the daughter; and the case then runs on all fours with the case of *Jesson v. Wright*, except that by the omission of the word "such" in the limitations over, a general failure of issue is here more plainly expressed.

I must say here, as was said in the judgment of *Jesson v. Wright*, that the direction, that the heirs shall take as tenants in common and not as joint tenants, manifests the intention of the testator to modify the estate in a manner which the rules of law will not permit, but does not manifest an intention on the part of the testator to exclude any heirs of the body, and that the gift to one child, if there should be but one, does not narrow the general devise to the heirs of the body, because such one child being an heir of the body, the gift to such child is consistent with the general intention; and upon the whole, I adopt the expression of Lord *Eldon* in *Jesson v. Wright*, and declare that I think it clear that the testator intended that all the issue of his daughter should fail, before the estate should go over. I cannot impute to the testator the intention that the issue of his daughter's children should be disinherited, if their parents should happen to die in the daughter's lifetime.

With respect to the second question, I am of opinion that a different sense cannot be given to the expressions
of

of this will as applied to the personal and the real estate, because it is the plain intention of the testator in the limitations over, that the real and personal estate should go together, and the words must, therefore, receive the same construction as to both estates. The daughter therefore took an absolute interest in the personal estate.

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 DUNK
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 FENNER.

As to the third question, I am of opinion that the real and personal estate are both chargeable with the annuity of 150*l.* given to the daughter's husband. The real estate is in the first place given in trust for the purposes thereafter stated, and the gift of this annuity is one of those purposes. In a subsequent part of the will the testator directs, that, upon his daughter's death without issue, his goods and effects shall be sold, and his legacies paid, and a sum sufficient to produce 150*l.* a year invested by his executors in good and safe security for the benefit of his son-in-law during his life; and this direction would clearly charge the personal estate with his annuity. He then directs that his real estates shall be sold upon his daughter's death without issue, or upon the decease of the survivor of his brother and sister; and then he in effect directs that all the rest and residue of his personal estate, including the produce of his real estates, shall be divided into four parts; treating the produce of the real estate as one common fund with the personal estate, and speaking of the common fund as a rest and residue after satisfying his declared purposes, and charging, therefore, the common fund for these purposes, and, among others, with the payment of the annuity.

His Honor doth declare, that, according to the true construction of the testator's will, *Elizabeth Jarman*, the testator's daughter, took an estate tail in the freehold

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estates of the testator, and that the reversion in fee of the said freehold estates passed by his said will to the Defendants *John Howlett Fenner* and *Dean Rayner Pike*, as surviving trustees of the will of the testator; and his Honor doth declare, that the Defendant *Daniel Jarman* is absolutely entitled to the personal estate of the testator: and his Honor doth declare, that the annuity of 150*l.* a year by the testator's will given to *Daniel Jarman* during his natural life, and the legacies in the will mentioned, payable at the death of *Elizabeth Jarman*, are chargeable on the real and personal estate of the testator in proportion to their values. (a)

Reg. Lib. 1830. A. fol. 1495.

(a) See *Campbell v. Harding*, *Malcolm v. Taylor*, pp. 390. 416. *supra*.

ROLLS.
1830.
Dec. 6.

ALEXANDER v. MULLINS.

A person entitled to a share of a sum of money, which is due as a debt from a testator, cannot maintain a bill for his own share, unless he sues on behalf of himself and all other parties interested in the debt, or makes those other persons parties to the suit.

A TESTATOR bequeathed 300*l.* to his executor, upon trust, to pay the interest to Mr. *Alexander* during his life, and after his death, to his wife during her life; and upon the death of the survivor, to transfer the principal sum to their children in equal shares.

Mr. and Mrs. *Alexander* were both dead, leaving four children, of whom the Plaintiff was one. The testator's executor died without having made the investment as directed by the will. The bill was filed against the personal representative of that executor, alleging that the other three children had received their shares, and praying payment of the Plaintiff's share of the legacy.

It

It appeared by the answer, that the other three children had not received their shares, though payments had been made to them on account.

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ALEXANDER
v.
MULLINS.

The cause coming on to be heard, Mr. *Beames* objected that the other three children were necessary parties.

Mr. *West*, *contra*, insisted that where a legacy of a definite sum was given in equal shares to a definite number of persons, each of them was in the same situation as if he were, in form as well as substance, sole legatee of a given sum ; and he cited *Smith v. Snow.* (a)

The MASTER of the ROLLS was of opinion, that inas-much as the executor of the original testator had been guilty of a breach of trust in not making the investment, and his assets were liable to make good this legacy, the suit was in truth a creditor's suit; and that a person, having an interest only in a portion of a debt, could not maintain a bill for the recovery of his share of the demand, unless he sued on behalf of himself and all other persons interested in the debt, or made those other persons parties.

His Honor therefore allowed the objection, and the cause was ordered to stand over.

(a) 3 *Mad.* 10.

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Rolls.

1836

April 30.

May 4.

CLEGG v. CLEGG.

The testator, upon the marriage of his daughter *Catherine*, covenanted to make her fortune equal to that of any one of his five other daughters. By his will he gave to *Catherine* absolutely a provision equal to that which he gave to any one of his other five daughters and their issue; but the fortunes bequeathed to these five daughters were limited to them for life only, with remainder to their issue; and in case any one of the five should die without leaving issue, her share was to go to the others of the four daughters and their issue, in the same manner as their original shares.

JOHNN CLEGG, having six daughters, *Mary* the wife of Mr. Gordon, *Catherine Clegg*, *Ann Clegg*, *Alice Clegg*, *Sarah Clegg*, and *Hannah Clegg*, previous to and in consideration of the marriage of *Catherine* with *William Clegg*, executed a bond bearing date the 29th of December 1785, in the penal sum of 3000*l.* to be paid to *William Clegg*, his executors, administrators, and assigns, with a condition, which, after reciting "that *John Clegg* had promised to *William Clegg*, that in case the marriage took place, he *John Clegg*, would, either during his life or by his last will, make the fortune or patrimony of *Catherine Clegg* equal at the least to the fortune or patrimony of any one of his other daughters," declared "that if the said *John Clegg*, his heirs, executors, administrators, or assigns, should, from time to time and at all times thereafter, pay, give, grant, convey, and assure unto *Catherine Clegg* or her issue, so much and such sum or sums of money, estate, or effects, or things, and at such time and times as he the said *John Clegg* should at any time or times thereafter during his life, give, grant, convey, or assure, unto any of them, the said *Mary Gordon*, *Ann Clegg*, *Alice Clegg*, *Sarah Clegg*, *Hannah Clegg*, or to any husband which any one of them had or thereafter might have, or to the children or issue of any one, exceeding in value the sum or sums of money, estate or estates, effects and things, which he the said *John Clegg* should then have paid, advanced, given, granted, conveyed, or assured unto *Catherine Clegg*

One of the five died without issue: Held, that *Catherine* could not claim an additional provision in respect of the benefits thereby derived by the other four daughters and their issue; her absolute interest in her own share being equivalent in value to the interests of the other daughters and their issue in their respective shares, and their contingent interests in the shares of each other.

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Clegg or her husband, children, or issue; and also should in and by his last will and testament or otherwise, make, cause, procure, or effect the part, share, proportion, or interest of *Catherine Clegg* or her children or issue, of, in, and to the real and personal estate of him, *John Clegg*, to be at the least equal in value to the part, share, proportion, or interest, of any one of them, the said *Mary Gordon*, *Ann Clegg*, *Alice Clegg*, *Sarah Clegg*, and *Hannah Clegg*, and the husband of any of them, or the children or issue of any one of them, of, in, and to the same, (the several sum and sums of money, estate and estates, effects and things, which the said *John Clegg* should at any time during his life have paid, advanced, given, granted, conveyed, or assured, unto each and every or any of his said daughters or their respective husbands, children or issue, to be taken and considered in part of and towards such part, share, proportion, and interest, of, in, and to such real and personal estate,) and also if the said *John Clegg* had not at any time theretofore made, done, executed, entered into, published, or declared, and should not at any times or time thereafter do, make, execute, enter into, publish or declare any act or acts, deed or deeds, last will or testament, or any other matter or thing whatsoever, whereby or by means whereof, the part, share, or proportion, right, title, interest, benefit, advantage, claim, pretence, or demand of any one of them the said *Mary Gordon*, *Ann Clegg*, *Alice Clegg*, *Sarah Clegg*, and *Hannah Clegg*, or any husband which any one of them then had, or at any times or time thereafter might have, or the children or issue of any one of them, of, in, to, or out of the real or personal estate which the said *John Clegg* at any time theretofore had been, then was, or at any time or times thereafter should be seised of, or entitled to, was, were, could, should, or might be greater, or exceed in value, be prior in commencement, in payment, or otherwise prefer-

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preferable to the part, share, and proportion, right, title, interest, advantage, benefit, claim, or demand of *Catherine Clegg*, or her children or issue, of, in, to, or out of the same real and personal estate of the said *John Clegg* ;”—then the bond was to be void, and otherwise to remain in full force.

John Clegg, by his will, dated the 27th of *November* 1793, devised, after the death of his wife, freehold property in *Oldham*, late *Wolfendens*, unto and equally among his six daughters, in manner following:—As to one sixth of it, on certain trusts for the benefit of *Mrs. Gordon* and her issue; and as to the other five sixths, unto his other five daughters, *Catherine*, *Ann*, *Alice*, *Sarah*, and *Hannah*, equally, as tenants in common for their respective lives, and after their several deceases, he gave their respective shares to their respective child or children living at the time of such decease, and the issue of such of their children as should be then dead, their heirs and assigns as tenants in common; the issue of a deceased child to take only the parent's share. He next devised certain premises for the benefit of *Mrs. Gordon*; and after reciting that he had given his other four daughters 1000*l.* each, upon or since their respective marriages, he bequeathed to *Alice* and *Hannah* 1000*l.* each. He then devised certain premises to his executors upon trust to sell, and bequeathed to them his personal estate upon trust to convert the same into money: and he directed that they should stand possessed of the proceeds of the sale of these real estates and of his personal estate, and of the securities in which they should be invested, for the equal and separate benefit of his five daughters, *Mary*, *Ann*, *Alice*, *Sarah*, and *Hannah*, for their respective lives to their separate use; “and after the decease of all or any of the daughters, upon trust to pay
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and apply her or their respective shares unto or amongst her or their respective children living at the time of her decease, and the lawful issue of such of them as should be then dead, the issue to take only their parent's share, and if any of them should have only one child, or issue of only one child, then the whole of the daughters' share was to go to such child or issue;" and if any of his five daughters *Mary, Ann, Alice, Sarah, and Hannah*, should die without leaving any issue of her or their bodies then living, then in trust to pay the interest of such share or shares to the testator's other daughters for life, and the principal to their children and issue at such times and in such manner, shares, and proportions as were thereinbefore directed, for or in respect of their original shares thereof. He next devised certain premises to *Catherine*, her heirs and assigns; and after providing for the equalisation of the shares, in case the property given to *Catherine* should exceed in value that which each of his other daughters and their issue took, the will proceeded as follows: "and if it shall appear upon such equalisation, collection, and contribution, as aforesaid, that the provisions hereinbefore and hereinafter made, for such of my daughters *Mary, Ann, Alice, Sarah, Hannah*, and their issue, shall be of greater value than the provisions before made, for my other daughter *Catherine Clegg*, then, I hereby charge and make chargeable the estates and money, except the money given and bequeathed to my two daughters *Alice* and *Hannah* as aforesaid, hereinbefore and hereinafter given unto and in trust for my said daughters *Mary, Ann, Alice, Sarah, and Hannah*, as aforesaid, with such sum of money to be paid to her, my said daughter *Catherine*, her executors, administrators, and assigns, to and for her own use, as will make the provisions hereinbefore and hereinafter to be made for all my said daughters equal in value."

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All the six daughters survived the testator. *Hannah* afterwards died without having been married. *Ann* and *Alice* had no children. Arrangements had been made, by which an equalisation was effected between the share of *Catherine* and the respective shares of her five sisters, except in so far as the property bequeathed to the latter consisted of lands devised in trust to sell, which had not yet been sold.

The bill was filed by *Catherine Clegg*, who had survived her husband, and by her children, for the administration of the trusts of the testator's will. It charged that *Hannah's* share did not, upon her death, go over to *Mary, Ann, Alice, and Sarah*, and their children, but that, by virtue of the bond, the Plaintiff was entitled to participate in that share equally with the other four daughters and their children: and that if *Ann* or *Alice* should die without leaving issue them surviving, the Plaintiff was also entitled to a share of the property devised or bequeathed to these two daughters.

Mr. *Bickersteth* and Mr. *Parker*, for the Plaintiff.

Assuming that, before *Hannah's* death, the share of each of the six sisters was equal, it is clear that if *Hannah's* share be divided between *Mary, Ann, Alice, and Sarah*, and their children, the families of each of these four daughters get more than *Catherine* and her children; and the condition of the bond is broken. In no event, can any one of the other daughters and her children, consistently with the tenor of the bond, become entitled under the father's will to a greater share of his property than *Catherine* and her children: yet by the division of *Hannah's* share among them, to the exclusion of *Catherine*, the fortunes of each of them, derived from her father, will exceed *Catherine's* in the
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ratio of five to four : and this inequality may be rendered still greater, if *Alice* and *Sarah* should die without leaving issue, and their shares should go in the manner directed by the will. In order, therefore, to fulfil the agreement contained in and enforced by the bond, *Catherine* and her children must participate equally with the other daughters and their issue in the share of *Hannah*, and in the shares of any other of the daughters who may die without leaving issue.

Mr. Tinney, contra.

Supposing the fortunes given to each of the daughters equal in amount, *Catherine's*, being given to her absolutely, would be of greater value than that of any of her sisters, who took, subject to the contingency of their interest being defeated by their dying without leaving issue : and if *Catherine* were to derive any increase of fortune in the event of that contingency, she would get more than any of her sisters ; for no part of what is given to her could go to them, and she would have the chance of their fortunes devolving to her and her issue.

The shares of each of the five other daughters is lessened in value to the original taker by the contingency to which the testator makes it liable ; and this loss is compensated to each by the chance of participating in the fortunes of the other four. Thus there is equality among the five ; and the share of each of the five, taking into account, on the one hand, the diminution of value from its being defeasible on a given event, and on the other hand, the chance of benefit to each from participating in what is given originally to the other four, is not more than equal to *Catherine's*.

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The MASTER of the ROLLS.

Upon the marriage of the testator's daughter *Catherine*, he entered into articles to give to her or her husband or issue, by deed or will, a provision, equal in value to what he should give to any one of his five other daughters.

By his will, he gave to *Catherine* absolutely a provision equal in amount to that which he gave to any of his five other daughters; but the provision for his other daughters was limited to them for life only, with remainder to their issue, and if any of the five should die without issue, her provision was to become divisible between the other four daughters for life, with remainder to their issue in the same manner as their original shares. One of the five daughters died without issue; and a question in the cause was, whether, under the articles entered into by the testator on *Catherine's* marriage, she was entitled to share with the other four daughters in the share of the fifth daughter who had died without issue.

The provision for *Catherine* being given to her absolutely, she thereby takes an equivalent in value to the contingent interests which the five daughters took in each other's share; and she is therefore not entitled to claim any further provision in respect of the benefit derived by the four daughters from the share of the fifth daughter who died without issue.

“ His Honor doth declare that the Plaintiff *Catherine Clegg* takes no share under the will of *John Clegg*, the testator, in the property given by the said will to *Mary Gordon*, *Ann* the wife, and now the widow, of *Thomas Close*, *Alice Clegg*, *Sarah Clegg*, and *Hannah Clegg*, the
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five other daughters of the said testator; and his Honor doth declare that the share of the said Plaintiff *Catherine Clegg*, under the said testator's will, being given to her absolute use, she thereby takes an equivalent in value to the shares given to the said *Mary Gordon*, *Ann* the wife, and now the widow of, *Thomas Close*, *Alice Clegg*, *Sarah Clegg*, and *Hannah Clegg*, the five other daughters of the testator, for life, with remainder and contingencies in the said testator's will mentioned; and his Honor doth declare that the equalisation already made, being in respect of the personal estate alone, and not including any equivalent for the value of the freehold and leasehold estates directed to be sold, but not yet sold, the Plaintiff *Catherine Clegg*, is entitled to one sixth of such value, to make her share, under the will, equal in value to the share of her sisters, and that she is entitled, for her life, to one sixth of the freehold estate in *Oldham* late *Wolfenden's*," &c.

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Reg. Lib. 1830. A. fol. 3067.

CLUTTERBUCK v. EDWARDS.

BY the indenture of settlement, executed on the marriage of *Bryan Edwards* with *Martha Phipps*, two sums of 1000*l.* and 4000*l.* were covenanted to be paid to trustees, on trust to invest the same, and permit the

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of his wife, to his son, to be paid to him at her decease, if he shall then have attained twenty-one; and in case his son dies under twenty-one, and after the wife, he gives the fund to his brother; and in case the wife shall outlive both the son and the brother, he gives it to the brother's daughters then living. The son attained twenty-one, and died in the lifetime of the wife, who survived both the son and the brother; there were daughters of the brother then living: Held, that the representatives of the son, and not the daughters of the brother, were entitled to the fund.


A testator appointed a fund, after the death

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said *Bryan Edwards* during his life, and after his decease, the said *Martha Phipps*, afterwards *Martha Edwards*, during her life, to receive the interest and produce thereof; and after the decease of the said *Bryan Edwards* and the said *Martha Edwards*, in case there should be any child or children of their bodies then living, to pay the said sums of 1000*l.* and 4000*l.* unto and amongst all and every of such child or children who should survive them both, and who should attain the age of twenty-one years, being a son or sons, or eighteen years, being a daughter or daughters, but not otherwise, at such times and in such parts, shares, and proportions, and in such manner and form as *Bryan Edwards* should, by deed or writing, or in and by his last will and testament in writing, to be signed, published, and declared in the presence of two or more credible witnesses, give, direct, limit, and appoint; and in default of such gift and direction, limitation, or appointment, as the said *Martha Edwards* (in case she should survive the said *Bryan Edwards*) should, in manner therein mentioned, appoint; and, for want of such appointment, then on trust to pay, apply, and dispose thereof unto and amongst all such child or children, in equal proportions, if more than one, or if only one, then the whole to such one child, provided he, she, or they should then have attained, or should live to attain, being a son or sons respectively, the age of twenty-one years, or being a daughter or daughters respectively the age of eighteen years, but not otherwise; and, in the mean time, to pay the interest and produce thereof for the maintenance and education of such child or children respectively: but in case there should be no child or children living at the death of the survivor of the said *Bryan Edwards* and *Martha* his wife, or there being such, such child or children should not attain to the age or ages of twenty-one years, being a son or sons, or eighteen years, being a daughter or daughters, then, on trust,

trust, to pay the said sums to the executors or administrators of the said *Bryan Edwards*, to and for their own use, and benefit, and to and for no other use, trust, intent, or purpose whatsoever.

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The will of *Bryan Edwards*, which bore date the 6th of *December* 1799, and was executed and attested in the manner required by the said indenture, after reciting the marriage settlement and the power of appointment, which he had under it, continued as follows, viz.

“And, whereas, I have at this time only one son living, named *Zachary Hume Edwards*, now I do, by this my will, by virtue and in pursuance and exercise of the said power contained in the said settlement, and of all other powers vested in me, give, and bequeath, and direct, limit, and appoint the said two several sums of 1000*l.* and 4000*l.* from and after the decease of my said wife unto my said son, *Zachary Hume Edwards*, to be paid to him on the decease of my said wife, if he shall then have attained the age of twenty-one years; and in case my said son die before he shall attain the said age of twenty-one, and after the decease of my said wife as aforesaid, I give and bequeath the said two several sums to my brother *Zachary Bayley Edwards*, his executors, administrators, and assigns; and in case my said wife should survive my son, *Zachary Hume Edwards*, and also my brother, *Zachary Bayley Edwards*, then I do, by virtue of the powers in me vested by the said indenture of marriage settlement, give and bequeath the two several sums of 1000*l.* and 4000*l.* after the death of my said wife, unto and amongst such of the daughters of my said brother, *Zachary Bayley Edwards*, as shall then be living, to be divided equally between them share and share alike.”

The brother died in *August* 1812, leaving several daughters. The son, *Zachary Hume Edwards*, attained

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the age of twenty-one years, and died in August 1812. The widow died in 1825, without having attempted to exercise the powers reserved to her in the settlement. Several daughters of the brother were living at the time of the widow's death.

The bill was filed by the representatives of the surviving trustee; and, the question in the cause was, whether, at the death of the mother, the two sums mentioned became the property of the representatives of the son, or vested in the daughters of the brother?

Mr. Wray, for the daughters of *Zachary Bayley Edwards*.

Mr. Boteler and *Mr. Rogers*, for the other Defendants.

On behalf of the daughters, it was submitted that there was a clear and express gift to them, in case the testator's wife survived both the son and the brother; that that event had happened; and the plain effect of the words was not to be defeated by doubtful conjecture deduced from clauses which provided for a different state of circumstances.

The MASTER of the ROLLS.

Where the language of an instrument is clear and consistent throughout, a court is bound to act upon the expressed intention, although it may not appear to be the most rational intention. If throughout this part of the will, it appear to be the clear intention of the testator that the interest should not vest in the son, although he attained twenty-one, unless he also survived his mother, then, however hard the case may be, his children can have no claim. By the first gift, the son would clearly take an absolute interest, although he neither attained twenty-one nor survived his mother, the payment only
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being postponed till he attained twenty-one. It is probable; however, that the testator did not mean that he should take unless he did attain twenty-one, the effect of the second gift being, that if he died under twenty-one, after the death of his mother, the two sums should go over to the testator's brother; and these two gifts taken together import, that the interest would, at all events, vest in the son at twenty-one. The last gift is clearly a substitution of the brother's daughters for the brother, in case neither of the former gifts should take effect; but having taken effect by the son's attaining the age of twenty-one, the substitution is out of the question, and the son's representative is entitled.

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"The Court doth declare, that the Defendant, *Thomas Fitzgerald*, as the personal representative of *Zachary Hume Edwards*, is entitled to the 8048*l.* 5*s.* 10*d.*, bank 3 per cent. annuities, standing in the names of *Daniel Clutterbuck* and *Edward Baker*, and 1858*l.* 4*s.* 7*d.* bank 3 per cent. consolidated annuities, standing in the name of the Plaintiff, under the bequest contained in the will of *Bryan Edwards*."


Reg. Lib. 1830. A. fol. 1727.

The Defendants, the daughters of the testator's brother, *Zachary Bayley Edwards*, appealed against his Honor's decree.

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Sir *E. Sugden* and Mr. *Wray*, in support of the appeal.

It may be conceded as a general proposition, that in construing a settlement or will, which makes a provision for children subject to a prior life interest, the Court leans strongly in favour of that construction by which the children will take a vested interest at twenty-

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one or marriage, (the period when they are likely to require it) whether they survive the tenant for life or not; *Woodcock v. The Duke of Dorset* (a), *Hope v. Lord Clifden* (b) *Shenck v. Legh* (c). But that applies only to cases where the words are of equivocal and doubtful import. Where the language of the instrument is clear, consistent, and unambiguous, the principle has no place, and the Court must then give effect to the plain meaning of the words, without regard to the hardship which such a construction might possibly produce, under certain conceivable circumstances and in particular cases; *Wingrave v. Palgrave* (d), *Howgrave v. Cartier* (e), *Lloyd v. Bird* (g), *Perfect v. Lord Curzon*. (h) In *Hotchkin v. Humfrey* (i), Sir Thomas Plumer lays down the doctrine of the Court upon this subject in very distinct terms; and that case afterwards came by appeal before Lord Eldon, who affirmed his Honor's decree. Now in order to arrive at the true construction to be put upon this bequest, it is necessary to consider the will in connection with the marriage settlement. That settlement gave no power to *Bryan Edwards* to appoint, unless to a child who should survive both parents; and the will, which was manifestly intended as an exercise of the power, and which studiously pursues the provisions of the settlement, is framed with a special regard to that circumstance. No one of the legatees is to take a single shilling until the fund, which was the subject of the settlement, falls into possession. The bequest is, *after the decease* of the wife, to the son, if he shall then have attained twenty-one; and in case the son die before he shall attain twenty-one and after the decease of the wife as aforesaid, then the fund is to go to the testator's brother; and in case the wife survive

(a) 3 Bro. C. C. 569.

(b) 6 Ves. 499.

(c) 9 Ves. 300.

(d) 1 P. Wms. 401.

(e) 3 P. & B. 79.

(g) Cited 9 Ves. 505.

(h) 5 Mad. 442.

(i) 2 Mad. 65.

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survive the son (that is, whether the son attain twenty-one or not, for if he died before the wife, that circumstance was immaterial, as he was himself to take nothing in that event), and also the brother, then among the daughters of the brother who should be then living. All the three clauses are perfectly consistent and natural; and it is impossible to import into the third clause containing the gift to the brother's daughters, the condition that the son should have died under twenty-one, contained in the second clause, without doing a manifest violence to the words, without, in fact, making to that extent a new will for the testator.

Mr. Boteler and Mr. Girdlestone jun., in support of the decree.

There is no substantial distinction between this case and the cases referred to on the other side, which, as it is admitted, have fully established the general rule of the Court. It is not to be presumed that the testator could ever have intended, that if his son attained twenty-one in his mother's lifetime, and died leaving issue, such issue were to be excluded by the children of his brother; nor can any reason be suggested why those children should be placed in a better situation than their father, who, although he was a degree nearer in blood, and therefore a more natural object of the testator's bounty, was to take only in the event of the son dying under twenty-one. The will is recited to be made in pursuance of the power in the settlement, and of all other powers vested in the testator. It was plainly intended to operate, and it did in fact operate, as a disposition of the whole of the Plaintiff's interest in the fund, in whatever character possessed, and from whatever quarter derived; and the ultimate limitation in the settlement having vested the property in *Edwards*, his executors, administrators, and assigns, so as to make

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him in effect the absolute owner, it would be unreasonable, for the purpose of aiding the appellants' construction, to confine it to that portion of interest only as to which the testator had a power of appointment given him in express terms.

Mr. Rogers, for other parties.

Sir E. Sugden, in reply.

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The LORD CHANCELLOR.

The question in this case arises upon the construction of Mr. *Bryan Edwards*' will — a will made in execution of a certain power contained in his marriage settlement, and of all other powers in him vested. The settlement does not appear very precisely to pursue what must have been the intention of the parties, and such as it is, the will misrecites it.

The will, in the part which raises the present question, appoints the fund, after the wife's death, to *Zachary Hume Edwards*, to be paid to him on her decease, if he shall then have attained the age of twenty-one, and if he die before twenty-one and after the wife's decease, to *Zachary Bayley Edwards*, the testator's brother; and if the wife survives *Zachary Hume Edwards* and also *Zachary Bayley Edwards*, then to *Zachary Bayley Edwards*'s daughters, after the wife's death, then living. These daughters are the present appellants.

The events expressly and in terms provided for, then are, — first, that of *Zachary Hume Edwards* attaining twenty-one and surviving the wife, — and secondly, that of his dying under twenty-one and after the wife. Neither of these events happened, as the son died after attaining

attaining twenty-one, but before the wife. A third provision is then made, which may, though not expressly and in terms, cover the event which has happened, namely, that of the wife surviving both *Zachary Hume Edwards* and *Zachary Bayley Edwards*; for nothing is there said of the age at which *Zachary Hume Edwards* is supposed to die, and it may be above, as well as under, twenty-one. But I think this inconsistent with the plain and governing intention of the disposition. The event happened literally as this third provision contemplated; the wife did survive both the testator's brother and his son. But I hold the event which happened, of the son's attaining twenty-one, not to have been in the contemplation, and not to fall within the scope of this third clause.

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Let us take the three provisions in their order.

The first appears to declare the governing intention of the whole disposition. [His Lordship here read the clause.] The testator had only the power of appointing after the wife's decease; but he also directs the sum to be paid on her decease at the legatee's age of twenty-one. If this clause had stood alone, there would have clearly been a gift to the son, if he attained twenty-one, but to be paid upon the death of the wife. If the son died under twenty-one, and before the wife, no provision is made for that event in terms; though the case comes under the third clause just as much as if he died after twenty-one. But if he attains twenty-one, the wife's death is of necessity the term of payment, she having the life interest in the fund. If he died under twenty-one and after the wife, the second clause provides for that event. [His Lordship here read the second clause.] This second clause is not at all inconsistent with the construction put upon the first. It only provides for

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the event of *Zachary Hume Edwards* surviving the wife, but dying under age. Then the brother is to take, because, by the first clause, no interest was to vest in the son unless he attained twenty-one.

Then comes the third clause in these words; — [His Lordship read the third clause.] The event which has happened, of the son reaching twenty-one but predeceasing the wife, falls, no doubt, within this clause. But it does not more fall within it than the event which has not happened, the event, namely, of the son dying under twenty-one and before the wife. The third clause then covers both these events equally, both of the son reaching twenty-one and not reaching that age when he predeceased his mother. But it appears plain that the one and the only one meant to be provided for is the latter, that of the son predeceasing his mother under twenty-one. Construing the third with the first clause this seem to be its true intent. The violence would certainly be great of the other construction, cutting out the grandchildren of the testator in favour of his nieces, and making the interest which the son took depend upon a contingency wholly immaterial, namely, his surviving his mother — material indeed as to the term of payment, but immaterial as to the vesting of the estate, and to make the nieces take an interest merely because their uncle's wife had survived his son, though their father, the testator's brother, was only to take any interest in case the son died under twenty-one.

It was said in the argument that the Master of the Rolls had struck out this third clause; but I think he must be held only to have so construed it that it might be consistent with the other clauses, with the prevailing intention, and with the rational sense of the whole instrument.

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The view therefore which I take of the third clause is this; — admitting that it raises the most considerable difficulty in the case. The event of *Zachary Hume Edwards's* death, under twenty-one, and after the wife, had been provided for by the second clause in express terms. The event of *Zachary Hume Edwards* attaining twenty-one and surviving the widow had been provided for, in express terms, by the first clause. The death of *Zachary Hume Edwards* before the wife remained to be provided for, and that is done by the third clause; but as the second brought in the brother *Zachary Bayley Edwards*, on the supposition of his surviving the widow, so the third, contemplating the death of the brother before the widow, as well as the predecease of the son, brings in the brother's daughters; and the question being, with reference to this third clause, whether it shall be read in one or other of two ways, that is, as providing for the son's predecease, whether under or above twenty-one, or as providing only for his predecease under twenty-one; I read it, according to the general intention, in the latter way, thus, "in case my wife survives my son under twenty-one, and also my brother, then to my nieces."

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a
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If, indeed, the cases were so strong as to make it impossible to give the words this construction, there would be an end of the question, and the violence must be done to which I have adverted. But they are not so. In *Hotchkin v. Humfrey* (a) the bequest was, in case there should be no such daughter or son that should live to receive the same, then the term to be utterly void. There it was held that the fund was contingent, and that the shares out of it could not be vested, because, until the surviving parent's death, it was impossible

(a) 2 Mad. 65.

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possible to tell whether the fund would exist by the term being raised. The Vice-Chancellor said, "the clear intent must govern, and in this case the clear intent is, that the surviving children shall take."

In *Wingrave v. Palgrave* (a), which is always cited on questions of this kind somewhat of the same view was taken. Lord *Cowper* reconciled the construction to a rational and probable intention in favour of the heir of the family, though the son of an after-taken wife, relying besides on the plain and invincible sense of the words — words to use Lord *Thurlow's* expression "not to be got over."

In *Shenck v. Legh* (b), though the Master of the Rolls expressed a leaning, perhaps a strong leaning, as to the construction of the gift over, yet he had no occasion to decide on that point; but the words there may be considered more hard to get over than the third clause here. Sir *William Grant* said if there had been any thing equivocal in them, he would have construed them so as to vest the portions at twenty-one or marriage; and the rest of the case is favourable to the general view upon which this question would seem to have been determined below; as are also Lord *Eldon's* remarks in *Hope v. Clifden*. (c)

In the observations of Sir *William Grant* in *Howgrave v. Cartier* (d) I see nothing repugnant to the course here taken by his Honor. On the contrary they rather favour it. There, as in the present case, there was a clause which, as the Master of the Rolls said, taken by itself and literally, would confine the provision

(a) 1 *P. Wms.* 401.(b) 9 *Ves.* 300(c) 6 *Ves.* 499.(d) 3 *Ves. & B.* 79.

provision to children surviving both parents; and in order to get rid of the effect of this clause, and construe it in the way most rational, his Honor rejected the word "such" and read it as if it had been "any child." As in *Powis v. Burdett* (a) the Court got rid of the word "leave" and turned it into "have." The general observation to which no doubt his Honor referred, is that "if the settlement clearly and unequivocally makes the right depend upon the child surviving both or either parent, the Court has no authority to control that disposition. If the settlement is incorrectly and ambiguously expressed, if it contains conflicting and contradicting clauses, so as to leave in a degree uncertain the period at which, or the contingency at which the shares are to vest, the Court leans strongly towards the construction which gives a vested interest at the period when it is most needed."

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Upon these grounds I affirm the judgment, without costs. (b)

(a) 9 Ves. 428.

3 Mylne & Keen, 316. Tucker

(b) See *Bright v. Rowe*, v. *Harris*, 5 Sim. 538.

1821.

June 2.
July 22.Ex parte INGE, In the Matter of CATHELINE
HALL

A person who endows a close fellowship in a College comprising other fellowships of an older foundation, will be presumed to be generally cognizant of the statutes and rules of the College, and to mean that his fellow shall be subject to the same provisions with respect to election and admission as the other fellows, except in so far as those provisions are controlled by the express terms of the endowment.

Where, therefore, out of several candidates for a close fellowship, only one fulfilled all the conditions required by

the endowment, that circumstance was held not to exempt him from the necessity of undergoing the usual College examination, to prove his fitness for the fellowship. But the standard of merit set up on the examination of such a candidate, should be not relative, but positive; merely ascertaining that he is duly qualified, and having no regard to the comparative qualifications of his competitors.

THE memorial of the Rev. John Roper Inge, addressed to his Majesty as visitor of Catharine Hall Cambridge, among other things stated that Thomas Frankland, formerly head master of a free school in Coventry, devised to the master and fellows of Catharine Hall, Cambridge, and to their successors for ever, so much of his personal estate, from and after the decease of his wife, as, together with his messuages or tenements and lands in Cambridge, should amount unto the value of 600*l*, to the intent that 20*l*. a year out of the aforesaid lands and personal estate should be towards the maintenance of one fellow to be sent to the said Hall out of the free school in Coventry; the which, with a convenient chamber for which he had paid 50*l*, would make a handsome provision for the Frankland fellowship.

By the same will, the sum of 10*l*. a year, out of the aforesaid lands and personal estate, was directed to be paid for and towards the maintenance of one scholar to be sent to the said Hall out of the free grammar school in Tamworth; and if the value of the sum of 600*l*. should in any way fall short, the scholar from Tamworth school was to bear the loss of what should fall short of paying him 10*l*. a year, the testator's will being, that

that the fellow from *Coventry* school should have full 20*l.* per annum. And the testator's will further was, that "the nomination and election of the said fellow and scholar should be and remain to the master and fellows aforesaid, yet still so as they should have a careful regard to the recommendation of the mayor and aldermen of *Coventry*."

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The memorial then stated, that by a receipt under the common seal of the master and fellows of the said College, dated the 29th of *July* 1682, it appeared that they received of the said *S. Frankland* the sum of 60*l.* in consideration of a chamber of the yearly value of 6*l.*, to be, from time to time for ever thereafter, occupied and enjoyed in the said College by the fellow, for the time being, who should be in and enjoy the fellowship there founded by the said *S. Frankland*.

The memorial further stated, that the memorialist had been regularly educated at, and had been a scholar of the said free school of *Coventry*; that he went from that school to *Trinity College, Cambridge*, where he took his degree of bachelor of arts in *January* 1827; that he was then duly ordained deacon, and after serving a curacy for a year, was admitted to priest's orders, and was appointed curate of a parish in *Coventry* by the head master of the free school of that city, which curacy he still continued to hold: that, in *September* last, a vacancy happened in the *Frankland* fellowship in *Catharine Hall*, and that he stood for that fellowship, with several other candidates, none of whom, however, had ever been scholars of the free school of *Coventry*: that he left with the Master of the College testimonials of character from various persons, clergymen and others, who had had opportunities of knowing his conduct and attainments, and in particular one from the head master of the *Coventry*

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Coventry free school, certifying that he had been a scholar and educated at that school, 'and had also been appointed curate of the parish in *Coventry* of which the said master was the rector.

The memorial further stated that in the month of *December* last the election to the *Frankland* fellowship took place; and that notwithstanding the memorialist was the only qualified candidate, a person of the name of *Smith*, who was a member of *Catharine Hall*, but who had never been a scholar of the free school at *Coventry*, was elected to the fellowship.

Upon these grounds the memorialist submitted that he had a right, and ought to have been appointed to the fellowship in question, in preference to any other candidate; and he appealed to his Majesty the King, the visitor of the college, against the election of Mr. *Smith*, as being contrary to the will of the founder.

The application was referred, according to the usual course in such cases, to the Lord Chancellor.

The memorial was supported by the affidavits of several clergymen, who stated that, in their judgment, Mr. *Inge* was a gentleman of piety and good moral character, and of competent learning to entitle him to the *Frankland* fellowship. Counter-affidavits, with respect to the nature of the examination and the mode of election, were also filed by the College. The effect of these affidavits is stated in the Lord Chancellor's judgment.

Sir *E. Sugden* and Mr. *G. Richards*, for the memorialist, contended that the College, having accepted the benefits of the *Frankland* foundation, upon certain conditions,

ditions, in augmentation of their original endowments, was bound to observe those conditions strictly and in good faith; *Attorney-General v. Christ's Hospital* (a): and that in rejecting Mr. Inge, who was not shewn or alleged to be unqualified, and preferring Mr. Smith, it had violated the declared will of the founder and had been guilty of a plain breach of trust, which it was the duty of the visitor to correct. The College, like all similar institutions, was naturally desirous to convert what was now a private or particular, into an open fellowship. Fellowships confined to candidates supplied from a particular school or county or family, in the nomination to which the electoral body could exercise but a very limited degree of patronage and control, had never been much in favour either with the electors or the public; and of late years every effort had been made to throw them open, or to get rid of them entirely. (b) Nevertheless, where, as in the present instance, the terms of the foundation were clear and express, and the candidate who claimed the benefit of it had duly fulfilled the requisitions of the founder, it was not competent to the College to exercise a discretion in rejecting the applicant, unless the electors had some substantial and *bonâ fide* objection to him grounded on his moral or intellectual unfitness.

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Sir C. Wetherell and Mr. H. Batley, for Catharine Hall, and Mr. Jacob, for Mr. Smith, who had been elected to the *Frankland* fellowship in opposition to the memorialist, submitted that Mr. *Frankland*, like every other person who endows a fellowship to be annexed to an existing and long established foundation, must be assumed to have been conversant of the general rules by which the body was governed in the election of its ordinary fellows, and to have intended that those rules should

(a) 1 Russ. & Mylne, 626.

(b) See *W. Black. Rep.* pref. ix.

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should equally apply to the fellowship instituted by himself. Mr. Inge, independently of the fact that he did not come directly from *Coventry School* to *Catharine Hall*, but had intermediately been a member of *Trinity College*, and therefore did not strictly fill the character required by the will, had wholly declined to submit to any examination, relying upon his supposed right to be elected as of course. So far from proving himself to be the most worthy (which the electors had not required of him), he had not complied with the rules of the College, which made it imperative that every candidate for a fellowship, whether a close or an open fellowship, should approve himself *worthy*, by submitting to a regular examination, and satisfying the electors that he was qualified by his moral and religious character, as well as by his intellectual acquirements, to be permanently associated with themselves as a governing member of the society.

In the course of the argument the following cases were referred to: *The Attorney-General v. Clare Hall* (a), *The King v. The Bishop of Ely* (b), known also by the name of *St. John's College v. Todington* (c), *Davies's Case* (d), *Ex parte Wrangham* (e), *The King v. The Benchers of Lincoln's Inn*. (g)

July 25.

The LORD CHANCELLOR.

This case comes before me upon an appeal to the visitatorial jurisdiction of the Crown exercised through the Great Seal, the King being the visitor of *Catharine Hall*; and it is the appeal of the Reverend John Robert

(a) 5 Atk. 662. 1 Ves. Sen. 78.

(b) 1 W. Bl. 52. 71.

(c) 1 Burr. 158.

(d) Stated in Comp. 379.

(e) 2 Ves. Jun. 609.

(g) 4 Barn. & Cresk. 845.

Robert Inge against the decision of the master and fellows of that learned body, who have refused to admit him a fellow upon the *Frankland* foundation, on the ground that he declined to submit himself to a certain examination.

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Mr. Inge was a bachelor of arts. He had undergone the examination which was necessary for obtaining that degree, but he refused to undergo any special examination with a view to his election to the *Frankland* fellowship.

That fellowship was founded by a person of the name of *Frankland*, who in the year 1691 endowed it by his will, and appointed the choice in the following manner;—[His Lordship here read the words of the will already set forth, and continued as follows:—]

Mr. Inge was educated at *Coventry* school, and brought with him the recommendation of the mayor and aldermen of *Coventry*; although he had not come immediately from that school, a circumstance upon which an argument, not much relied upon however, was attempted to be raised against him. When the founder says the nomination is to be of a person to be sent to the Hall out of the free school of *Coventry*, that the candidate must come directly from the *status pupillaris* of the school, to the *status* of a fellow of *Catharine Hall*, is a construction for which I see no pretence whatever, either upon the words strictly taken, or upon the sense, and reason, and principle of the thing. He must be a person who has been a scholar at the *Coventry* school, provided a person who has been there educated is fit to be a fellow at the time when he claims the fellowship. The mode of ascertaining that fitness alone raises the question on the present occasion; *Mr. Inge* maintaining that it was sufficient

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for him to present himself with the certificate of his having belonged to *Coventry* free school, and the certificate of the mayor and aldermen required by the founder; and the master and fellows of *Catharine Hall* on the other hand maintaining that he must undergo such an examination as is usual in that Hall, before he can be admitted.

Now upon the fullest consideration I have been able to bestow upon this case, and it is one of no small importance with reference to the great collegiate institutions and endowments of this country, most of which, besides their own general fellowships, have had certain annexed fellowships given to them by the bounty of pious individuals, I am of opinion that when a new fellowship is annexed to an existing College or Hall, the fellow is to be chosen according to the manner of election usually adopted in such College or Hall.

When a man endows a fellowship, he knows the nature of the original foundation to which he wishes it to be attached; he must be taken to be generally acquainted with its statutes, if not with the detail of its rules. He must at all events be presumed to be aware of the great inconvenience, not to say absurdity, that would result from endowing a fellowship to be held by a person who had not the qualifications, which would render him fit to associate with the other fellows, chosen for their good qualities, and learning, and morals, according to the ordinary rules of the foundation.

And this, which appears to be so consonant to every reasonable view, is also the view that has been taken by different courts in decided cases. I shall refer only to the case of *The Attorney-General v. Talbot* (a),
in

(a) 3 Atk. 662.

in which this was the subject of a great deal of elaborate discussion, and in which the then Lord Chancellor, Lord *Hardwicke*, laid down the principle in the plainest possible terms. It was the opinion of Lord *Hardwicke*, as is perfectly clear from that case, that when a person endows a fellowship, he is to be considered as cognizant of the rules prescribed for the admission of fellows into the College, cognizant generally of the qualifications required by the College, and as submitting his fellow to those rules; and intending not only that when such fellow has been elected, he shall be subject to the rules of the body, but that his mode of admission also, and his entrance upon the fellowship shall be according to the general provisions which apply to the case of the other fellows.

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There is, however, one restriction, and a very proper one, which has in practice been imposed upon the rule in the admission of such fellows; and it is founded upon the peculiar nature of the fellowship itself. The general rule, as it was laid down by Dr. *Dampier*, the late Bishop of *Ely*, — before whom, as visitor of *St. John's College, Cambridge* (a), an appeal was brought in 1808, in disposing of which he was assisted by his brother Mr. Justice *Dampier*, a Judge of eminent learning, especially in this branch of law, — the general rule is, that the open fellowship shall be given to the best or most competent candidate in learning and morals, but the close or particular fellowship shall be given to the person coming from a certain school, or from a certain county or place, or from a certain family, (for you have them of all these kinds;) nevertheless not absolutely and because he has these qualifications and no other, but provided he has also the qualities without which

(a) See a note of the judgment here referred to, p. 603. *infra*.

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which his election would only be a disgrace to the college, and a slur upon the memory of the founder himself.

Upon this principle, accordingly, that appeal was decided by the Bishop of *Ely*; but as it was not made public, I have only adverted to it on account of the authority of the learned Judge to whom I have referred, and the very sensible and judicious manner in which the Bishop expresses himself upon the subject.

Upon the same principle the usage has been, and a very fit one it is, that an examination of the candidate shall take place, and that while the general fellowship is given, by open competition, *digniori*, the particular fellowship shall be bestowed on the candidate who, though not *dignissimus*, is *dignus*, and who fulfils the other conditions required by the endowment. So that when an individual comes forward and claims a close or propriety fellowship, like the *Frankland* fellowship for instance, he is to be taken and examined apart; implying, not that he shall be rejected unless he excels the other competitors — those who might be competitors for a general fellowship — but that he shall be chosen, provided he is not disqualified by being *minus sufficiens* in learning or in morals.

The College proceeded strictly on this principle in the present case. They offered to examine Mr. *Inge* apart from the other candidates; thus clearly excluding open competition; for Mr. *Inge* brought with him the necessary recommendation of the mayor and aldermen of *Coventry*; but he declined to undergo any examination, on the ground, as I gather from his affidavit, that from what passed between him and the bursar of *Catharine Hall*, he was impressed with the belief that
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the College had determined to elect out of the several candidates the individual who should pass the best examination, without regard to the fact of Mr. *Inge* having been educated in the free school of *Coventry*, and being the only candidate from that school.

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Now, the bursar, Mr. *Burrell*, by his affidavit, positively denies that he ever gave Mr. *Inge* any reason whatever to believe that the College had come to any such determination; and, indeed, that gentleman does not assert that Mr. *Burrell* ever so stated; for he only speaks as to his impression from what passed being to that effect. But Mr. *Burrell*'s affidavit goes on to state, that "it was agreed upon by the master and fellows of *Catharine Hall* aforesaid, that the said *J. R. Inge* should be examined apart from the other candidates in consequence of his having been educated (as was alleged), at the free grammar school of *Coventry*."

The result of my inquiries into the practice has furnished me with information respecting all the elections which have been had since the year 1711, when, upon the death of the founder's widow, who had a life interest in the property devised, the first election of a *Frankland* fellow took place. Mr. *Palmer* was the first who was elected upon this foundation, and he had the recommendation of the mayor and aldermen of *Coventry* (a); but, in the year 1721, a Mr. *Cramer* succeeded

(a) The following query was, in the year 1710, submitted by the college to Sir *Edward Northey*, then Attorney-General, previously to the first election of a *Frankland* fellow,— "Whether the college must

send down to *Coventry* to elect such boy, or may the master send from the school what boy he pleases, and the college make [choice of] those whom they think best qualified." Answer.— "I am of opinion that the

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ceeded him, against that recommendation, which was given in favour of another, a gentleman of the name of Cross, who was rejected. And one or two cases occur of the party having had no recommendation. There are ten or a dozen instances in all; but that is the only one in which the College have rejected the applicant; and properly so, I think, there being no other person whom the Corporation of *Coventry* would recommend, and who was fit for the fellowship.

It may be said that the rule I have laid down, or rather I would say, have stated, — for the principle of the rule is clearly recognised by Lord *Hardwicke* in the
case

the college may make the election at *Cambridge*, the corporation being to recommend for their election, which will be made, on their judging of the ability of the person recommended; and although they are directed to have regard to, yet they are not bound by the recommendation, though I take it the founder did not intend they should refuse without reason. *E. Northey, Dec. 26. 1710.*"

It was also stated that the College were in possession of an opinion given at the same time by Sir *Nathan Wright*, in which he referred to and expressed his concurrence in the opinion of Sir *E. Northey*. If this statement were correct, the fact might seem to warrant an inference that Sir *Nathan Wright*, who presided in the Court of Chancery as Lord Keeper, from the year 1700 to 1705, returned to the practice of his profession

after he resigned the Great Seal. Probably, however, Sir *Nathan Wright* may have been consulted rather as a friend of the College than professionally.

The first recommendation of a candidate for the *Frankland* fellowship by the mayor and aldermen of *Coventry* was as follows: — "We, the mayor and aldermen of the city of *Coventry*, do recommend *John Palmer*, &c. who was educated at the free grammar school in *Coventry*, to the master and fellows of *Katherine Hall* in *Cambridge*, to be by the said master and fellows nominated and elected a fellow of the said hall, to fill the said fellowship, hoping that they will comply with this our recommendation, so that the said *John Palmer* shall appear to the said master and fellows qualified for such nomination. Dated 26th Feb. 1710-11."

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case referred to, and also by Lord *Mansfield* in another case reported in *Burrow (a)*, — it may be said that that rule invests the College with a power to exclude the special object of the endowment, and to convert the particular into a general fellowship. That, however, I deny. It might be so, if there were no visitatorial power to superintend and control the electoral body. But this right of electing and rejecting* certainly imports some degree of fitness; the very words used, “nomination and election,” imply that the appointment is not to be a mere matter of course. Election is choice; although that expression, it may be said, might mean an election between persons coming from *Coventry* grammar school, when it would of course be for the master and fellows to decide who were the candidates to be chosen or rejected.

It may be objected, however, that to give them the power of rejection, on the ground of the candidate being *minus sufficiens*, is calculated to make the fellowship a general fellowship. My answer to that objection is, that this is a trust vested in certain persons, and to be exercised, like all other trusts, in perfect good faith and good conscience; and that if those to whom it is committed are found to reject, — which is always a matter of circumstantial evidence, for in each case the examination of the candidate must be recorded, — if they are found to reject candidates who indisputably possess the title contemplated by the founder, upon a mere pretext that they are deficient in learning or morals, the visitatorial power will then interfere and control them. For such conduct would be a fraudulent and unfaithful discharge of their office. But it must be a strong case to entitle the Crown to say they have fraudulently executed

(a) *St. John's College v. Todington*, 1 *Burr.* 158.

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executed the trust, because, if they so acted, they would forfeit their character, and fail in the performance of a sacred duty.

I am therefore of opinion that no mischief is likely to arise from the right of election being exercised in this way, and that such right cannot be safely exercised in any other; the visitatorial power of the Crown being always maintained, and the whole proceeding being constantly subject to the review of that power.

With respect to Mr. Inge himself, enough has been disclosed to shew that all that was done on his part proceeded from mistake. Even if this had not so appeared, I should still have allowed him to go again before the master and fellows; for I should have deemed that he had acted under a mistaken view of his strict right, that he was entitled to have that strict right tried, and after it was found against him, I should have given him the same leave to go before them again, and with as peremptory a right, to be examined, as I should have given him, if the case had arisen upon a demurrer at law, and the demurrer had been over-ruled. For it would by no means follow that because he had mistaken his legal right, he was therefore to be excluded from all title; more especially as he appears to be a man against whose learning, morals, and good conduct no imputation whatever is cast. Under such circumstances he has a perfectly good title, in my opinion, to go before the master and fellows again to be examined. (a)

(a) With respect to the visitatorial power, in addition to the cases referred to in the argument, see *Usher's case*, 5 Mod. 452.; *Philips v. Bury*, 2 T. R. 346.; *The King v. St. Catherine's Hall*, 4 T. R. 233.; *The King v. The*

Bishop of Ely, 2 T. R. 290., 5 T. R. 475.; *Green v. Rutherford*, 1 Ves. sen. 462.; *Attorney-General v. Black*, 11 Ves. 191.; *Attorney-General v. The Archbishop of York*, 461. *suprà*; *Attorney-General v. Crook*, 1 Keen, 121.

1851.

Ex parte ——— in the Matter of St. JOHN'S
COLLEGE, CAMBRIDGE.

UNDER the terms of the deed by which the *Beverley* fellowship in *St. John's College, Cambridge*, was founded and endowed, the master and fellows of the College were directed to "elect and choose into the said fellowship a person naturally born within the town of *Beverley* aforesaid, if any such shall be found able within the said University."

The following is the note of the judgment of Dr. *Dampier*, Bishop of *Ely*, the official visitor of *St. John's College, Cambridge*, with respect to an election to that fellowship, to which the Lord Chancellor referred in the preceding case. (a) The *gravamen* of the complaint to the visitor was, that although the appellant was the only candidate who was a native of *Beverley*, the College had elected, in preference to him, a gentleman of the name of *Holmes*, who had not that qualification.

"The appeal of * * * * *, Clerk, a member of your College, has been laid before me, in which he complains to me, as your visitor, of a wrongful exclusion of himself from a *Beverley* fellowship, to which, by virtue of a certain indenture, bearing date the 11th of *July*, in the 17 *H. 8.*, and made between *Nicholas Metcalf*, then master of the College, and the fellows of the same, of the one part, and Dame *Johane Rokeby*, and others, of the other part, (a copy of which indenture was sent with the appeal) he presumes that he was of

Under a deed of endowment, directing that the master and fellows of a College shall elect into the fellowship thereby created and annexed to the College a native of a particular town, "if any such shall be found able within the University," the master and fellows may examine a candidate for such fellowship, who is duly qualified by birth, with a view to ascertain that he is "able;" and, if he is not found "able," may elect another candidate, who, without the qualification of birth, possesses the requisite "ability."

right

(a) See p. 597. *supra*.

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right entitled. The answer of the senior fellows, given with the consent of the master, under their common seal, together with certain exercises composed by the appellant while under examination as to his ability for the said fellowship, and the reply on the part of the appellant, in which by my permission he was indulged, have all and each of them been considered by me with that earnest, and most impartial attention, which was demanded from me in a question, in which I feel that the interests, as well of the College, as of the members of it who claim admission into the propriety fellowships, are materially concerned. The opinion which I have formed on these documents, and which I am about to declare, is founded on the fullest conviction of my own mind, and the most strict and impartial regard to the question itself, and the interests involved in it.

I begin by observing that the question is not as to comparative merit; because the appellant, supposing him to be "able," could claim to be elected as of right. If he is "able," he ought to have been elected, though there might have been twenty other persons, not born in *Beverley*, of better parts, and of superior attainments.

It is my further opinion that the statutes of the College, even had Dame *Rokeby* been wholly silent upon them, must be taken into consideration; because whoever is adding one member to a society, must be supposed to contemplate the nature of that society, the purpose for which it was erected, and the order and discipline established there to effect that purpose. But they are so far referred to as to shew that they were in the mind of both the parties to the contract; and therefore the consideration of these statutes cannot be excluded from the interpretation of the word "able" in the deed.

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The foundress, Dame *Rokeby*, must be supposed to have intended to confer a benefit on the town of *Beverley*, by encouraging its inhabitants to bring up their sons to useful learning, otherwise she might have granted an annuity instead of founding a fellowship. The appellant's argument contradicts this, and says that she founded a fellowship, to attain which no exertion, no industry, no learning is required. A degree, however disgracefully acquired, and a capacity of getting into orders, is all that, according to his argument, can be exacted of a native of *Beverley*.

1881.
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Is this any good to the town? Is it any good to the College? Could the College be supposed to have accepted the grant on such terms as would disgrace them by the incapacity of Dame *Rokeby*'s fellow, and plant a licensed example of idleness before those who aspire to the fellowship?

The appellant and those who have claims to propriety fellowships are much mistaken when they suppose their "ability," or any similar qualification expressed in their respective deeds of foundation, is not to be estimated by the public examinations of the College, because these have been lately instituted. All regulations of discipline, whensoever adopted, are tests of the ability of those who seek by whatever title to become members of the College. In open fellowships the principle is *detur digniori*; in proprieties, *detur, sed digno*.

On the complaint of the appellant, that only the worst exercises were sent to me by the College, it is sufficient to observe, that they were such as the appellant offered on his examination for the fellowship.

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It is my opinion, that no local claim can compel the College to admit a member who would by his ignorance or incapacity disgrace the society, and frustrate the purposes for which it was founded. Had the society contracted so to do, their contract would have been against their statutes and void. But they cannot be considered as having entered into such a contract; ability to fill the office is necessarily implied in such a stipulation.

I therefore pronounce and declare that I concur with the College in thinking the appellant not "able" within the true meaning and construction of the deed; and the appeal of the said * * * * is hereby dismissed, and the election of Mr. *Holmes* confirmed.

1831.

Aug. 11. 15.

PEARSON v. CARDON.

Where goods in the hands of a bailee have been subsequently so treated and dealt with by the bailor as to constitute or acknowledge an apparent title to them in two distinct parties, the rule which prevents an agent from filing a bill of interpleader against his principal does not apply.

THIS was an appeal brought by *Fermin De Tastet*, one of the Defendants in an interpleading suit, against a decree of his Honor the Vice-Chancellor. The case, upon the hearing in the Court below, is reported in the 4th volume of Mr. *Simon's Reports*, p. 218.

Sir *E. Sugden* and Mr. *Koe*, for the appeal.

The Solicitor-General (Sir *W. Horne*) and Mr. *Jacob*, *contra*.

The counsel for the appellant relied strongly on a recent decision of Sir *John Leach*, at the Rolls, in a case of

of *Cooper v. De Tastet* (a), from which they submitted that the case under appeal could not be distinguished.

On the other side, *Clarke v. Byne* (b), and *The East India Company v. Edwards* (c), were referred to.

The material facts of the case, and the principal arguments urged in support of the appeal, are stated and considered in the judgment.

The LORD CHANCELLOR.

This was a question arising upon a bill of interpleader. The Plaintiffs Messrs. *Pearson* and Co. were warehousemen in *London*, who, in the months of *April* and *May* 1818, received from *Bize, Bordenave* and Co. 38 bags of wool, which bags were to await the directions of the bailors, and the bailees were to have their usual warehousing charges allowed. On the 3d of *July* 1819, a letter from *Bize, Bordenave* and Co. was received by the Plaintiffs, who were thereby directed to transfer 94 bags of wool, including the 38 bags in question, and to hold them at the disposal of *Fermin de Tastet*. But there was a very important reservation contained in that order,—and this is one of the circumstances on which mainly my opinion turns,—a clause reserving to themselves (*Bize, Bordenave* and Co.) the privilege of drawing samples from the wools in those bags. The parties filing the bill of interpleader accordingly transferred the bags of wool in question into the name of *De Tastet*, in their books; and they continued so to hold them for *De Tastet* after that time, under the authority, however, of *Bize, Bordenave* and Co., and

subject

(a) 1 *Tampl.* 177.

(c) 18 *Ves.* 376.

(b) 13 *Ves.* 393.

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reported in the Rolls (a), though the report
is incorrect, or that learned Judge has not
yet expressed himself with his usual very
accuracy, — for doubtless he there meant to
make a distinction between a party who was and
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subject to the reservation which gave to the latter the right of drawing samples.

On the 29th of *August* 1819, Mr. *Roehm*, who was agent for the Defendant *Cardon*, delivered a letter to the Plaintiffs, demanding the 38 bags, and stating that they did not belong to *De Tastet*, but to him, *Cardon*. This letter would have signified nothing, had it not been accompanied by another from *Bize, Bordenave* and Co., in which they said they concurred in the application, and requested the Plaintiffs to act according to that letter, and offered to indemnify them for so doing. No mention was there made of any other or ulterior right, but they completely excluded the right of *De Tastet* — as completely as by the letter of the 3d of *July* they had conferred it on him. The ground upon which *Cardon* claimed, was by a title paramount to theirs. He stated that the goods were his property, and that *Bize, Bordenave* and Co. had no right whatever to make them over to *De Tastet*. The firm of *Bize, Bordenave* and Co. may not very inaccurately be said to be only another name for *Fermin De Tastet*; for *Bordenave* was the nephew of *De Tastet*, and *De Tastet* was a partner in that house, interfering in the concerns of the firm in the months of *April* and *May* 1818, when the deposit was first made, and also in the month of *July* 1819, when the order to hold for his use was sent. On the 25th of *August* 1819, between the date of the first and second orders, *De Tastet* quarrelled with his nephew and wrote him a letter, stating that the partnership between them was determined. He therefore considered himself (whether his nephew did so or not, we are not informed,) as having ceased to be a partner from that day; and four days afterwards, and without the pretence of any notice of the dissolution of partnership to the bailees, comes the second order from *Bize, Bordenave* and

and Co., which to all outward appearance, and for aught that the Plaintiffs could conjecture, was to all intents and purposes an order from the same party from whom they had received the previous order.

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Such then are the facts of the case, with this addition, that we have in evidence the circumstance out of which first arose the title of the Defendant *De Tastet*; that is to say, that he had a claim for advances to the house and for profits, and that to cover the amount of that claim the transfer was made, he probably threatening his nephew with the consequences of his refusal.

Upon such a state of facts, can I hold this to be a common case of a claim by an agent against his principal, and of another party claiming by another title, foreign to the title of the principal? That an agent should have the power of filing a bill of interpleader when his principal demands the re-delivery of goods bailed with him, appeared to me so monstrous a proposition, and to involve such frightful consequences in mercantile transactions, that I could not suppose it was meant to contend for any such doctrine. For in fact it amounts to this, that an agent may at any moment treat his principal to a Chancery suit; and I was therefore relieved to find that the Plaintiffs' counsel went entirely on the peculiarity of this case.

And now, entirely adopting the doctrine of that case before the Master of the Rolls (*a*), though the report must either be incorrect, or that learned Judge has not in his judgment expressed himself with his usual very remarkable accuracy, — for doubtless he there meant to point to the distinction between a party who was and
a party

(*a*) *Cooper v. De Tastet*, 1 *Tambl.* 177.

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a party who was not agent, to the distinction between an agent and a mere stakeholder, and not to the distinction between a public and a private agent; — I have no hesitation in stating it to be clear law that an agent cannot, *quæ* agent, if there be nothing to distinguish his situation from the common case, have a bill of interpleader against his principal.

But can I here hold *Pearson* and Co. to have been the mere agents of *Permin de Tastet* only? Certainly they were not so at first. But it may be said they became so afterwards, upon receipt of the letter from *Bize, Bordenave* and Co. I must then look to the terms of the letter constituting the agency, for that is their titledeed as agents, and it is also the titledeed of *De Tastet*.

If that letter had contained no clause reserving to *Bize, Bordenave* and Co. the right to draw samples, the case would have been materially different. But what can be less like a departing with the whole property, or tend more to keep it in a kind of suspense, than the power retained of drawing samples? What is meant by drawing samples? It means, with a view to sale. For what purpose is it retained? In order to deal and contract—that the party may be able to shew the goods to intending purchasers in the market. The order of *Bize, Bordenave* and Co. does not say, “we are to have the power of drawing samples with the authority of our partner *De Tastet*.” It was quite unnecessary to say so; for if *De Tastet* was to have such a power, he could of course exercise it, seeing he was the owner of the wool as well as a member of the firm. The addition would have been required if the intention was to give to *De Tastet* the entire and exclusive property in the wool. In that case the reservation would have been, “provided we have the authority of *De Tastet*.” The
bailees

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bailee could no more have refused to allow the drawing of samples, than *De Tastet* could have refused the payment of a bill of exchange drawn by the firm of which he was a partner. Can I therefore say, that this was such an out and out departing with the property, and delivery of it to *De Tastet*, or that it was such an order to a bailee to hold to the use of *De Tastet* exclusively, as vested in the latter the absolute property in the goods?

I greatly doubt whether it was such a delivery as would have deprived *Bize, Bordenave* and Co. of the right of stoppage *in transitu* for the unpaid price; or whether, supposing *De Tastet* not to have been a partner in that house, and a question to have arisen between *Bize, Bordenave* and Co., as sellers, and the bailee asserting the title of *De Tastet*, on the authority of the letter, this would have determined the *transitus*; the inquiry there always being, — have the goods reached their journey's end? and that they have not done, unless they are entirely vested in the bailee. But here a power remained in the bailor. The clause qualifying *De Tastet's* control over the goods, and inconsistent with his possessing an absolute right of property in them, is a very remarkable circumstance. Into this, however, it is needless to enter. It is sufficient to say that this peculiarity exists. There is besides another peculiarity. Here is first a joint delivery by the bailors, *Bize, Bordenave* and Co., that is, by *Bordenave* and *De Tastet* together; and then the latter ceases to be a partner, and *Bordenave* alone, but using the name of the firm, countermands the former order, and desires the goods to be delivered to the Defendant *Cardon*. Now this is precisely the case in which the paramount claim of *Cardon*, and the mesne claim of *De Tastet* coming

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into competition, a fit case for a bill of interpleader is raised.

It is quite clear, that to a party in the situation of agent, having no claim against his principal, no bill of interpleader will lie, if there be nothing to qualify the agency, and no privity between the principal and the other party claiming, so as to make them in a manner joint bailors. Observe the disagreeable situation of the bailee, for whose benefit and protection the remedy of interpleader lies. Observe the hard situation of the Plaintiffs, *Pearson and Co.* They knew nothing of the change of partnership. But a letter comes to them in *July* 1819, telling them to hold the goods to the order of *De Tastet*; and then comes another letter from the same party, telling them to deliver the same goods to *Cardon*. What could the Plaintiffs know as to the relative situation of the parties? *Non constat* they knew that *De Tastet* was a partner in *July*. But they either knew that fact or they did not. If they did not, here is a house which orders them in *July* to deliver the goods to *De Tastet*; and the same house in *August* orders them to deliver the goods to *Cardon*, that is, it countermands its own order. If they did know that *De Tastet* was a partner in *July*, how did they know that *De Tastet* had ceased to be a partner before the countermand was given? There is no evidence to shew, nor is it pretended, that the Plaintiffs had any such knowledge.

With respect to the case of agency, the common-law pleadings shed great light on this subject. There has succeeded to interpleader at law, a much more convenient mode of dealing with such questions, and one which I heartily regret has not been resorted to, and must blame the Plaintiffs for not adopting, in this instance,

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as it might have saved much expense and delay. When a wharfinger receives goods from *A.*, and two conflicting claims are made upon those goods, he says to the claimant whose title he considers to be the best, "Take the goods, but give me an indemnity, and then let the other party bring his action against me; but I won't give them up, unless you indemnify me against the consequences." That offer has now become almost a matter of course; and though the wharfinger lends his name to the action, the real Defendant is the person who has given the indemnity. This arrangement produces the whole effect of interpleader at law or in equity, and the action is tried once for all; and although the nominal parties are the bailee and one of the claimants, the real parties are the two conflicting claimants of the goods; one of them using the name of the person with whom the goods have been bailed.

That course has put an end to interpleader at law, and what now remains is only to be found in this Court. But in looking at the rules of interpleader at law, you discover the principles that govern this Court; because I hold it to be strictly a concurrent jurisdiction, and that you can have no interpleader here, if upon principle you could not have it at law. It is manifest that if two partners deliver goods, and then quarrel and claim the goods separately, the holder of those goods must have his remedy. The very case is provided for by the rules of pleading in bailment.

I have already stated the principle to be clear against an agent, as such, having a bill of interpleader. The circumstances of the present case, however, appear to me to take it entirely out of the general rule; and regard being had to the reservation of the right to draw samples, to the circumstance of *De Tastet* having been

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one of the firm, to his ceasing to be a partner only four days before the countermand was given, and that unknown to the Plaintiffs, to the fact that *Cardon's* paramount title had been sanctioned by what was, to all appearance, the same firm, but principally to the reservation of the power of taking samples, — I cannot consider this to be the case of a mere agent bringing interpleader against his principal, or of a warehouseman against a merchant employing his warehouse.

The decree must therefore be affirmed, and with costs. My judgment proceeds entirely on the specialties of the case; and I have only entered into the general principle, on account of the case referred to, of *Cooper v. De Tastet*, not knowing the grounds upon which that case was decided by his Honor. (a)

(a) See *Crawshay v. Thornton*, 2 *Mylne & Craig*, 1.

April 18.
May 9.

M'CARTHY v. DECAIX.

Where a person agrees to give up his claim to property, in favour of another, such renunciation will not be supported, if

at the time of making it, he was ignorant of his legal rights, and of the value of the property renounced; especially if the party with whom he dealt possessed and kept back from him better information on the subject.

A sentence of divorce pronounced by a foreign court cannot defeat the rights acquired by parties under a marriage solemnised in *England*.

THIS was a suit instituted by the personal representative of *Robert Tuite*, deceased, against the personal representative of his wife, also deceased, for the purpose of recovering the arrears of an annuity, to which, upon the death of the wife, and in default of her

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her appointment, Mr. *Tuite*, as administrator of his wife, had become entitled, by virtue of a settlement executed on their marriage. Mrs. *Tuite* died in the month of February 1807: her husband took out administration to her estate and effects; and in the month of December 1811 he died.

The defence set up was, that Mr. *Tuite*, soon after the death of his wife, had agreed to give up, and had actually renounced, all claims that might accrue to him under the settlement, or in his marital character, for the benefit of the family of his wife, from whom the settled property had been derived.

At the hearing of the cause, two questions were principally argued; first, whether the dealings and correspondence between Mr. *Tuite* and his wife's relations, in the years 1807 and 1808, were of such a nature as to amount to an absolute renunciation of all his interest in their favour; and, secondly, if they were, whether that renunciation was made at a time when Mr. *Tuite* was fully apprised of the extent of his legal rights, as the surviving husband and the administrator of his wife, and of the amount and value of her property.

At the hearing of the cause on the 12th of December 1821, before Sir *John Leach*, then Vice-Chancellor, his Honor referred it to the Master to inquire and state to the Court, whether *Robert Tuite* died in the intention of renouncing all interest in his wife's property in favour of her family, and whether before his death he was apprised of the circumstances which belonged to that property, and of the amount of the claim made in respect of the annuity.

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The Plaintiff appealed against that decree. The petition of appeal was originally argued before Lord *Eldon*; but his Lordship having resigned the Great Seal before disposing of the case, it now came on to be reheard.

Sir *E. Sugden* and Mr. *R. P. Roupell*, for the Plaintiff.

Mr. *Treslove* and Mr. *Stuart*, for the Defendant.

The argument consisted entirely of a commentary upon the facts of the case, and upon the language of the correspondence which passed between Mr. *Tuite* and Mrs. *Delattre*, (a sister of his deceased wife,) and their respective solicitors. The peculiar circumstances of the case, and the effect of the letters, so far as they are material to the point with reference to which the case is here reported, are stated in the Lord Chancellor's judgment.

May 9. *The* LORD CHANCELLOR.

This was a case of considerable difficulty, long pending in this Court, and much considered by Lord *Eldon*, who went out of office before he finally decided it on the appeal. The observations and notes of that learned Judge upon the case, with which notes I have been furnished, shew the great attention he gave to it, and the difficulty under which he laboured with respect to the facts; and in consequence of those difficulties, it has received the greatest attention from me, and I have delayed pronouncing an opinion until I could look fully into the matter.

The case was this: — A person of the name of *Tuite* contracted a marriage in this country with an *English-woman*;

woman; the marriage being solemnised in *England*, but he being himself a *Dane* by birth, fortune, and domicile. He afterwards removed his wife from this country, the *locus contractus*, (with which he appears to have had no further connection) to the dominions of the King of *Denmark*, where his subsequent domicile continued to be; and in that kingdom the marriage was dissolved by a valid *Danish* divorce, as far as such a divorce could dissolve it; but which, I may observe in passing, by the law of this land could have no operation, as was fully established by the opinion of the twelve judges, who solemnly decided, after argument, that no proceedings in a foreign Court could operate to dissolve or affect a marriage celebrated in *England*.

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During the lifetime of Mrs. *Tuite*, and subsequently to the divorce, certain arrears of an annuity which she enjoyed under the marriage settlement, accrued, or were said to have accrued, amounting at her death to the sum of 7000*l*. Prior to that event, a litigation in this Court had been commenced, to which the claim to these arrears was incident. After the decease of both husband and wife, the result of the suit was, to put the party representing her in possession of those arrears, and two sums were actually recovered and paid to them, amounting in the whole to 3631*l*.; and the whole of the question in this cause arises, with respect to those sums, it being a conflict between the respective personal representatives of Mr. and Mrs. *Tuite*, upon the effect of a correspondence between Mr. *Tuite* and Mrs. *Delattre*, the sister of Mrs. *Tuite*, and her legal adviser Mr. *Pinegar*.

Upon that correspondence the whole question in dispute appears to turn. On the death of Mrs. *Tuite*, letters are written by Mrs. *Delattre* representing her to

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have died in very poor circumstances; so much so that her debts were said to amount to more than all the little property she left could satisfy, even including her wearing apparel. Mr. *Tuite*, in reply, writes two letters to Mrs. *Delattre*, and in answer to her application to that effect, he at first refuses to execute a power of attorney to receive any funds that may become due, denying his right, because he insists it was a good divorce, (nor indeed had it been decided till *Lolley's* Case in 1812-13, that a foreign divorce was of no effect as regards an *English* marriage); and he afterwards says, "If such a power is required, I would not have any thing; her family is most heartily welcome;" and his language in another letter is—"I claim nothing, I would accept of nothing; nevertheless, in case it may by the form of your law be requisite, I give Messrs. *S.* and *L.* a power to act for me." How entirely he relied upon the marriage as being in other respects at an end, is manifest from the fact, that besides giving up the claim to the property of the deceased lady, he calls her by the name of Mrs. *Trefusis*, which was the name she bore before she became his wife.

It must, therefore, at least be admitted, that in giving this, which is called his renunciation, the husband laboured under two capital errors, one of law, the other of fact; the one not superinduced by any suppression of circumstances on the part of Mrs. *Delattre* and her agent; whereas the other may be said to have arisen from their not disclosing facts, which there is every reason to believe they must have known; the latter an error which if they did not create, they had at least, to a certain degree, a share in maintaining.

When I state that the first of these was a great error in point of law, it is of the highest moment that no
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doubt should exist on a matter of such paramount importance. I find from the note of what fell from Lord *Eldon* on the present appeal, that his Lordship laboured under considerable misapprehension as to the facts in *Lolley's Case*; he is represented as saying he will not admit that it is the settled law, and that therefore he will not decide, whether the marriage was or not prematurely determined by the *Danish* divorce. His words are, "I will not without other assistance take upon myself to do so."

Now, if it has not validly and by the highest authorities in *Westminster Hall* been holden, that a foreign divorce cannot dissolve an *English* marriage, then nothing whatever has been established. For what was *Lolley's Case*? (a) It was a case the strongest possible in favour of the doctrine contended for. It was not a question of civil right, but of felony. *Lolley* had *bonâ fide*, and in a confident belief, founded on the authority of the *Scotch* lawyers, that the *Scotch* divorce had effectually dissolved his prior *English* marriage, intermarried in *England*, living his first wife. He was tried at *Lancaster* for bigamy, and found guilty; but the point was reserved, and was afterwards argued before all the most learned judges of the day, who after hearing the case fully and thoroughly discussed, first at *Westminster Hall*, and then at *Serjeant's Inn*, gave a clear and unanimous opinion, that no divorce or proceeding in the nature of divorce in any foreign country, *Scotland* included, could dissolve a marriage contracted in *England*; and they sentenced *Lolley* to seven years' transportation. And he was accordingly sent to the hulks for one or two years; though in mercy, the residue of his sentence was ultimately remitted. I take leave to say,

(a) See *Russ. & Ry. C. C.* 237. and 2 *Cl. & Fin.* 567. n.

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say, he ought not to have gone to the hulks at all, because he had acted *bonâ fide*, though this did not prevent his conviction from being legal. But he was sent notwithstanding, as if to shew clearly that the Judges were confident of the law they had laid down; so that, never was there a greater mistake than to suppose that the remission argued the least doubt on the part of the Judges. Even if the punishment had been entirely remitted, the remission would have been on the ground that there had been no criminal intent, though that had been done which the law declares to be felony.

I hold it to be perfectly clear, therefore, that *Lolley's Case* stands as the settled law of *Westminster Hall* at this day. It has been uniformly recognised since; and in particular it was repeatedly made the subject of discussion, before Lord *Eldon* himself, in the two appeals of *Tovey v. Lindsay* (a) in the House of Lords, when I furnished his Lordship with a note of *Lolley's Case*, which he followed in disposing of both those appeals, so far as it affected them. That case then settled two points; first, that no foreign proceeding in the nature of a divorce in an ecclesiastical court could effectually dissolve an *English* marriage; and, secondly, that a *Scotch* divorce is not such a proceeding in an ecclesiastical court, as to bring the case within the exception in the Bigamy Act (b), for which nothing less than the sentence of an *English* ecclesiastical court is sufficient.

This then is a very important error which may have influenced Mr. *Tuite* in making this renunciation. And can I hold a party to be bound by an act or declaration made in ignorance of so material a fact? Was it not a
 most


(a) 1 *Dow.* 117. 131.

(b) 1 *Jac.* 1. c. 11. s. 2.

most material ingredient in forming his judgment and influencing his inclination? He might very well say, "I am no longer her husband; I give up all claim to her property," when he supposed the connection of husband no longer to subsist. And yet if he had been told that he was still her husband; that no power could dissolve the marriage; that he was liable, in his person and property, for her debts; that the tribunals of his own country would acknowledge this to be the law; that as he undertook the relation *cum onere*, so also he was beneficially entitled to whatever was the property of his wife, be it small or great; it is impossible to say that this knowledge might not have altered his intention; for if a man does an act under ignorance, the removal of which might have made him come to a different determination, there is an end of the matter. What he has done was done in ignorance of law, possibly of fact; but in a case of this kind that would be one and the same thing.

These considerations do not appear to have been sufficiently adverted to in the Court below. I cannot help thinking, besides, that taking the case at the lowest, Mr. *Tuite* and Mrs. *Delattre* were, at the time of the supposed renunciation, in a state of ignorance as to some other most material facts; and it is impossible to say, that a person shall be held to what he has done under circumstances which have been so erroneously represented to him, however innocently the representation may have been made. Who can venture to predict what might have been Mr. *Tuite's* course had he known how the facts really stood? If a man, separated and living at a distance from his wife, receives a letter telling him that she is on her death-bed, and that she leaves no assets — not enough to pay the costs of her funeral; and he writes in reply, "I shall not interfere: she is

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no wife of mine :” it is impossible to say that he shall be bound by that disclaimer, made under the influence of a common error.

Doubtless, if with a full knowledge that the wife's property might be large or might be small, he distinctly gave up all title to it, whatever might turn out to be its value, his disclaimer would be good. But if he entertained a *bonâ fide* belief that she died insolvent, it would be going far to say that his renunciation should bind him, or that the other party should have a right to hold him to it. In *Cocking v. Pratt* (a), where Sir John Strange had to deal with the case of a mother contracting with her daughter as to her share of the father's personal estate, he held the transaction to be void, on the ground that the mother plainly had better information than the daughter. But even if it be assumed that Mrs. Delattre knew no more of the real facts than Mr. Tuite, *Willan v. Willan* (b) is an authority to shew that where both parties were in a state of equal ignorance as to the facts respecting which they were dealing, the transaction will not be supported.

It is unnecessary for me, however, to decide as to the law on this point, because when the evidence is narrowly scrutinised, the circumstances of the transaction relieve the case from all difficulty, shewing that there is every reason to believe that the wife's relations, living in *England*, must have known, and did, in point of fact, know a great deal more than Mr. Tuite, the foreigner, living in *Santa Cruz*; and bringing the case, therefore, directly within the principle laid down by Sir John Strange in *Cocking v. Pratt*.

[The

(a) 1 Ves. sen. 400.

(b) 16 Ves. 72.

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[*The* LORD CHANCELLOR then entered into a detailed examination of the language and effect of the correspondence between the parties, and expressed his opinion that the conduct and letters of Mrs. *Delattre* and her agent clearly indicated that they were better informed as to the state of Mr. *Tuite's* property than her husband, and were well aware it was not of that insolvent description which had been represented. His Lordship then continued : —]

On the whole, it is sufficiently established that when Mr. *Tuite* agreed to give up any claim to his wife's fortune, he was acting under a misapprehension in two most material particulars : in the first place, he believed that Mrs. *Tuite*, at the time of her death, had by law ceased to be his wife, an impression which seems to have been the mainspring of his liberality ; and, secondly, he was wholly ignorant, or rather he was positively misinformed, with respect to the amount and value of her property, and his ignorance certainly was not shared, at least in an equal degree, by the parties with whom he was dealing.

Upon these two grounds I am clearly of opinion that the agreement cannot be supported as a valid renunciation by Mr. *Tuite*, and that the judgment of the Court below must be reversed. (*a*)

(*a*) The judgment of the Lord Chancellor in *M'Carthy v. Decaix* was cited and much relied upon in the recent case of *War-*

render v. Warrender, in the House of Lords, 9 *Bligh, N. S.* 89.; 2 *Cl. & Fin.* 488.; 2 *Shaw & Maclean*, 154.

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May 7. 9.

GOBLET v. BEECHEY.

A testator by his will gave a specific chattel to A. Afterwards by a codicil, he gave a number of articles of a different kind, and of much less value, to B., and in enumerating those articles, introduced an imperfectly written word which might be supposed to designate the chattel previously given to A.: Held, that the bequest to A. was not thereby revoked.

If property described in distinct and unambiguous terms is bequeathed to a particular person, a subsequent bequest of the same property to another must, in order to be effectual, designate the subject-matter of the gift in words so legibly written that no reasonable doubt can be entertained with respect to them.

THE will and codicil upon which the question arose are stated by Mr. *Simons* (a) in his report of the case before the Vice-Chancellor.

His Honor having over-ruled the exception, and declared that the Plaintiff was entitled to the models which the testator possessed at his death, or to the money which the sale of them had produced, amounting to the sum of 738*l.* 13*s.*, the exception was now reheard.

Sir *E. Sugden* and Mr. *Jacob*, for the exception.

The Solicitor-General and Mr. *Sidebottom*, *contra*.

In the course of the argument the Lord Chancellor expressed a clear opinion that the evidence of the female servant who attested the will, with respect to the meaning of the word “mod,” as stated to her by the testator at the time of attestation, was properly rejected in the Court below. (b)

The LORD CHANCELLOR.

This testator, who had previously by his will, and in express terms, disposed of his models at the time when he was disposing of all the rest of his collection, by a subsequent

(a) 3 *Sim.* 24.

(b) See 3 *Sim.* 26.

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v.
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subsequent codicil, being the 11th to that will, in a very unintelligible enumeration of articles, coupling them with tools, bankers, and marble in the yard, introduces the word “mod.” with what seems, and may be supposed to be, a hyphen, a point, a blot, or a small s affixed, and the present question is as to the meaning of that word. The Master called to his assistance Mr. *Caley*, a gentleman skilled in writing, and also Mr. *Garrard*, who is said to be an eminent statuary, and he has adopted the opinion of Mr. *Garrard* as to the writing, instead of that of Mr. *Caley*, and found that the word “mod” was a contraction for “models.”

Now, if I am to be bound by the evidence, the opinion of Mr. *Caley*, is at least as good as that of Mr. *Garrard*. Although the former professed himself unable to form any opinion as to what word was meant to be expressed by the characters in question, he thought there was no s affixed. But in what company is the word “mod” found to occur? It is found, not among articles of value, but thrown in among the tools in the shop, bankers, (which are great benches) the rasp, and something which is supposed to mean the testator’s apron. It is, to say the least of it, singular that the testator should have introduced his models, which were of very considerable value, and were the very apple of his eye, among such an assortment. That is one reason. Another is that the word “models” which occurs at full length in the will, would, upon this construction, be done away with, and that without any direct words of revocation, such as are found in the other codicils, where revocation was plainly the testator’s object, and without any certainty as to what he really intended. He would thus by a doubtful, or rather by a half word, revoke that which he had previously disposed of in formal terms.

I have

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I have great doubts whether if this were the case of a will of real property, in which the testator had made a formal devise of all his estates, and afterwards in a codicil had introduced the letters "est" in the middle of a gift of his pictures, books, cash at his banker's, furniture, &c., the codicil would be effectual to carry the estates previously given. It would be most dangerous to allow it to operate as a revocation of a previous devise which had been solemnly made.

Upon these grounds I am of opinion that the exception must be allowed.

May 11. 27.

MILES v. LANGLEY.

Under an agreement of exchange between A., who held lands under a college lease, and B., the owner of an adjoining estate, B. occupied part of the college lands, and A. had occupied, along with the residue of the leasehold part of B.'s estate. A. having become bankrupt, the college leasehold was sold,

THIS cause, reported on the original hearing at the Rolls in vol. i. p. 39. *suprà*, now came on to be reheard before the Lord Chancellor.

The Solicitor-General, Sir Charles Wetherell, and Mr. Wilbraham, for the Plaintiff, who appealed, relied strongly upon *Daniels v. Davison* (a) and *Taylor v. Stibbert* (b), cases which, they submitted, were not distinguishable in principle from the case before the Court.

Sir Edward Sugden, Mr. Tinney, and Mr. Benson, *contra*.

The

(a) 16 Ves. 249.

(b) 2 Ves. jun. 437.

and was described in the particulars of sale as "late the residence of A.:" Held, that the purchaser was not to be considered as having implied notice of the agreement of exchange, and that he had a right to recover by ejectment that portion of the leasehold which was in B.'s occupation.

In *The* LORD CHANCELLOR.

This is an appeal from his Honor, the present Master of the Rolls; and the case below depended entirely upon the question, whether *Langley*, who purchased under a bankruptcy from the assignees of *Hellicar*, had at the time of his purchase actual or constructive notice of the agreement between *Hellicar* and the party under whom the Plaintiff claimed. Some evidence was adduced with the intention of shewing that he had actual notice: this however failed entirely; and the only remaining question was, whether he had constructive notice, or what in this Court would amount to notice of the agreement.

An ejectment had been brought by the Defendants, and the bill was filed for an injunction and for the specific performance of the agreement, which was for an exchange of a small parcel of land, and had been entered into so long ago as the year 1798.

It was contended on the part of those who resisted the injunction and the specific performance, and who denied notice to *Langley*, that there was no allegation of notice in the bill. On looking into the pleadings, however, it appeared that there was a specific charge of notice in the bill, and a denial of that allegation in the answer. Still the question remained whether there was constructive notice of the agreement.

The case is one of considerable hardship whichever way it is determined, and it might possibly have been a case of less hardship if his Honor had decided it the other way, and admitted that there was enough in the circumstances of the case to amount to implied notice. It is a case in which one of two persons must sustain some degree of injury; but the decision cannot be

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governed by the consideration which of the two shall receive the least injury, though undoubtedly the hardship to one may be greater than that which falls upon the other.

His Honor was of opinion, that the case of *Daniels v. Davison* (a), on which much reliance was placed by those who argued that *Langley* had notice, did not go so far, and that to decide in favour of notice in this case, would be carrying a step farther the principle adopted in *Daniels v. Davison*; inasmuch as Lord *Eldon* there “held that a party was bound to inquire of the occupier of the land which he was about to purchase, what was the title under which he occupied; and was, therefore, to be considered as having implied notice of the nature of that title.” The rule in *Daniels v. Davison* goes, no doubt, a good deal farther than his Honor states: because if a person with whom I contract to purchase is not himself in the occupation of the land, but possesses it by a tenant, that is undoubtedly a circumstance sufficient to fix me with notice that there is a tenant on the land; and, according to *Daniels v. Davison*, I am called upon to make inquiry of that tenant, and to look to the title under which he possesses. For possession is *prima facie* evidence of the ownership of the fee; and if I am buying the fee from one who is not in possession, and a tenant hold under a lease, that is notice to me that he is a tenant, and I am bound to look to the nature of the title as between him and his lessor. The case of *Daniels v. Davison* was certainly understood on the other side of the Hall to carry the principle much farther; for if I rightly recollect, it was there held that a purchaser was fixed with notice of a collateral agreement, between the lessor and the lessee,

for

(a) 16 Ves. 249.

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for the purchase of the premises demised. This was carrying the principle a great deal farther, because the existence of such an agreement, was by no means a presumption arising *prima facie* from the fact of possession. Accordingly it has always been considered that *Daniels v. Davison* went a great way. “Am I then, says his Honor, in the present case, to carry the principle a step further?” That question he answers in the negative; and I fully agree with his Honor.

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After the best attention which I have been able to give to this case, — though it is certainly difficult to decide it satisfactorily either way, and hardship must necessarily be inflicted on one of the parties; — but having looked into all the facts and the evidence in the cause, not excepting the attempt which was made to dispute altogether the title of the Plaintiff, independently of the question of notice, and having compared the circumstances here with those in *Daniels v. Davison*, I have, upon the whole, come to the conclusion that in the present case it would be carrying *Daniels v. Davison* a material step further, if *Langley* were to be held fixed with notice. I shall not, therefore, disturb the decision of the Master of the Rolls.

1831.

June 15.

GODFREY v. LITTEL.

In order to sustain a bill for a commission to ascertain boundaries, the Plaintiff must establish, by the admission of the Defendant or by evidence, a clear legal title to some land in the possession of the Defendant, and also a ground for equitable relief; and where the quantity of the land of the Plaintiff, in the possession of the Defendant, is doubtful upon the evidence, the Court will direct a commission or an issue, as will best answer the justice of the case.

THE Defendant appealed from the decree of the Master of the Rolls, in this cause. The judgment of his Honor upon the hearing in the Court below is reported in 1 *Russell & Mylne*, 59.

The Solicitor-General, Mr. *Skirrow*, and Mr. *Wigram*, in support of the appeal, insisted that according both to principle and practice, two things were necessary to be established by a Plaintiff, before he could call upon the Court to issue a commission to ascertain boundaries; first, he must satisfy the Court that he had a title to some portion of the land with respect to which the relief was prayed; and next he must shew the quantity of land in acres, or in some other measurement, to which he was entitled. If he failed in the first point, no decree whatever could be made, and his bill must be dismissed. If he failed in the second, the Court might either undertake to investigate and decide the question for itself, upon the evidence brought before it or under a reference to the Master; or else, if that course were found more convenient, it might send the matter to be tried by a jury upon an issue. But it was not the province of a secret and irresponsible body like commissioners of partition to investigate and determine a question of title. The Master of the Rolls considered it discretionary either to grant an issue or a commission. But this Court had no right to delegate to the decision of commissioners what was in fact matter of law. The Court might and often had directed an issue in such cases; and, assuming (what was by no means admitted) that the Plaintiff in this case had made out the first point,

point, namely, his right to some portion of the intermixed lands, the Defendant would not have complained if that course had been adopted here. But he protested — and in that protest he was borne out by all the authorities in which the point had been taken, and especially by the language of the decree in *The Duke of Leeds v. The Earl of Strafford* (a) as it appeared in the Registrar's Book — against being compelled to submit to the judgment of commissioners of partition a grave and complicated question of fact and law, a question which they were wholly incompetent to determine.

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In addition to the authorities cited in the former argument, the following cases were referred to; *Webb v. Banks* (b), *Winton v. Newland* (c), *The Bishop of Durham's case* (d), *Norris v. Le Neve* (e), *Attorney-General v. Fullerton*. (g)

Sir Edward Sugden, Mr. Rose, and Mr. Lowndes, *contra*.

The LORD CHANCELLOR.

This branch of the jurisdiction of the Court appears to have drawn from many learned Judges, and particularly from Lord Northington, who presided for some years in this Court, expressions of considerable — I will not say disapprobation, but doubt. Lord Thurlow concurred with Lord Northington in manifesting an inclination rather to narrow than to extend the jurisdiction of the Court in this respect; nevertheless it is certain that

(a) 4 *Ves.* 180.

(e) 3 *Atk.* 82.

(b) 2 *Eq. Ca. Ab.* 164.

(g) 2 *Ves. & B.* 263.: see also

(c) *Seton on Decrees*, 200.

Attorney-General v. Bowyer, 5

(d) 12 *Vin. Ab.* 267.

Ves. 300.

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 v.
 LARKE.


that there is, in this Court, a jurisdiction applicable to cases where there arise an uncertainty and confusion of boundaries, by means of which jurisdiction such uncertainty and confusion are removed and cleared up, and the rights of the parties interested ascertained. In such a case as the present, where we find a tenant giving up a lease and retaining a part of the land demised, it being uncertain how much the tenant ought to have given up, but clear to the Court that some part was retained—for it is this which constitutes the ground of the jurisdiction—in such a case it is certain that this Court has the power to remedy the mischief, by granting either a commission or an issue, as either of these may best meet the justice of the case, or be most expedient, with a view to ascertaining the rights of the parties.

The first question is that upon which the whole jurisdiction of the Court, and, consequently, the decree of his Honor the Master of the Rolls is founded; namely, whether some portion of the demised land was retained by the tenant; though if any were retained, *non constat* how much, and possibly *non constat* where the land so retained was situated.

Before making any observation on the facts upon which my opinion is formed, in consonance with that of the Master of the Rolls, it is necessary that I should advert to a pretence set up, according to the case in *Bunbury* (a), that satisfaction in this Court can be obtained by the party seeking a commission in one case only, namely, on the admission of his title by the party against whom the relief is sought;—and, by *admission*, I take to be meant admission, on the pleadings. Now, I entirely agree with his Honor that if this were so, there could

(a) *Bishop of Ely v. Kenrick*, *Bunb.* 522.

could be no such remedy as a commission to ascertain boundaries; for the Defendant would, in every case, take especial care to deny the Plaintiff's title, and so deprive him of his remedy. "If the Defendant (it is said) doth not admit the Plaintiff's title, but denies that he has any lands in his possession belonging to the Plaintiff, in such case a Court of Equity will not grant a commission, because that would be admitting the Plaintiff's title in general, though the particular lands were not known."

1881.

 Goddard
 v.
 Little.

I take the meaning of this to be, that if an admission be made by the Defendant that he has in his possession *some* lands belonging to the Plaintiff, though it does not appear where or what, that is a case for a commission; and the contrary, if no such admission be made, — a conclusion contrary to all principle, and which seems justly to have met with the disapprobation of Chief Baron *Comyns*, who was for directing an issue.

The position laid down in *Bunbury* is indeed contradicted by the other cases; and in *Wake v. Conyers* (a) Lord *Northington*, though strongly disposed to dismiss the bill, and though he talks of the frightful consequences arising from such commissions, preferred accomplishing his object by taking another ground for the dismissal of the bill, namely, that the manorial rights claimed by the Plaintiffs were incorporeal hereditaments, and that the Defendants were entitled to the soil and freehold in the estates in question. This therefore proves that Lord *Northington* not only did not acquiesce in the principle attempted to be established in *Bunbury*, but that he wholly repudiated the authority of that case.

The


(a) 1 *Eden*, 531. 2 *Car*, 560.

1881.
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The law being admitted, the question is as to the facts in this case, and I have no hesitation in saying that I am perfectly satisfied, with his Honor, upon the whole of this evidence, that a part at least of these lands (which have been demised by the College from a period as far back as the reign of *Elizabeth* down to the last lease granted to the present Defendants in 1789,) — a part at least, though it does not appear exactly what part or how much, was situated on the north side of the *Chase-way*, and this part so leased by the College is admitted to be still in the possession of the Defendant.

The party claiming the commission has supported his claim upon two grounds; first, the amount and species of acreage; and, secondly, the evidence of terriers, and the testimony of witnesses. With respect to the acreage, the sixty acres alleged by the Plaintiff to be statutory acres are affirmed on the part of the Defendant to be customary acres. I put entirely out of view, however, the argument on the part of the Defendant by which the words “by estimation” in the lease were referred, not to the amount, but to the kind of acreage. The words “so many acres by estimation be the same more or less,” are the ordinary phraseology in leases, from the time of *Elizabeth* down to the present day; and any trifling variance in the collocation of the words can make no difference as to their meaning. The threescore acres by estimation are clearly referable to the number, and not to the kind of acres computed. But then it is said, there is evidence of a customary acre of three roods, and that, taking in the road, there would be forty or forty-five acres, sufficient to satisfy the exigency of the Defendant’s argument; for the Defendant relies on this, that the three-rood acre is applicable to uninclosed land, and the statute acre to

to inclosed land. This would at once raise the question, whether those lands, when they were demised in the reign of *Elizabeth*, were or were not inclosed lands. And I say that upon the evidence of the lease, the lands were inclosed and not common; for I find the words “*hedge-bote*” and “*style-bote*” in the lease, — a proof that there must have been an inclosure running across. We must take statutory acres, therefore, and not the alleged customary acres, to be applicable to these lands; and by the expression “three score acres be the same more or less,” we can only understand a quantity of land a little exceeding or a little falling short of sixty statute acres; a difference of fifty per cent could never have been intended. Now forty acres only have been given up instead of sixty.

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 v.
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That is a strong fact; and another strong fact is that the Defendant who relies on his own title and his own possession, has not taken care to satisfy the Court below and this Court in what right he possesses the two fields called the *Oxleys*. I should like to see by what title he possesses those fields, and whether by any other title than that alone, by which I have a vehement suspicion he holds—I mean a title by usurpation or retention, as against the College. It is a very remarkable circumstance, that Mr. *Littel* should have possessed in his own right those two fields and no other land whatever on the left side of the *Chaseway*. All the evidence goes to this; except one piece of testimony of a very frail character, seeing that it comes from the party interested *post litem*, when it rarely happens that a man states anything to destroy and defeat his own claim. The evidence as to abutments furnished by the Court Rolls of the adjoining manor, goes also strongly to shew that what are now called the *Oxleys* are in fact part of the *Lacy-field*.

Last

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 v.
 LITTEL.

Last of all comes a very remarkable piece of evidence founded on the circumstance that the lands are stated to be in two parishes and in two counties, 'a fact which appears by the map of the Defendant himself. At the corner of the map on the right hand of the *Chase-way* there is this note by the surveyor, "three counties here meet." Spots of this description, like the *trivium* of the ancients, are usually distinguished by some remarkable natural or artificial boundary, such as a ditch, a road, a river, or a hill. The *Chase-way*, therefore, we might naturally suppose to be the boundary of two of the three counties, namely, *Cambridge* and *Suffolk*. And this supposition is consistent with the lease by which lands in *Cambridge* and *Suffolk* are demised, but is inconsistent with the Defendant's claim; for the Defendant's case is, that all his leaseholds were in *Cambridge* and none in *Suffolk*.

Upon the whole of the evidence there is some doubt as to the direction of the lands, and as to the quantity to which the College is entitled; but I entertain no more doubt than his Honor did, that the evidence clearly shews that part at least of what ought to have been given up to the College, has been kept by the lessee. It is to be observed, moreover, that the Defendant, or rather those under whom he claims, have by making a fence done what has tended, under the circumstances, to aid the confusion of the boundaries.

With regard to the question, whether a commission or an issue be the more expedient course, this is clearly a case for a commission. Where the question is one involving a mere positive affirmation on the one hand, or a negation on the other, an issue is the fitter and more convenient course. But where, as in the present case, the object of the inquiry is, to ascertain how
 much

much of the land has been retained by the Defendant, and in what direction, and if the part retained cannot be exactly ascertained, to determine whether any and what compensation should be made to the Plaintiff, the investigation is much more easily and properly conducted by a commission, composed partly of learned persons, and partly of surveyors perambulating upon the spot, than before a jury, amidst the hurry and inaccuracy necessarily incident to a trial at *Nisi Prius*.

1891.

GODFREY
v.
LITTLE.

If the commissioners should find that only a very trifling portion of land has been retained, of course it would not be a case for compensation: but this conclusion can only be arrived at by accurately ascertaining the metes and bounds; and by such an inquiry the rights of the parties will be adjusted, so that in any event no harm can be done. It might, however, have been a safer and more satisfactory, as it would undoubtedly have been the more regular course, if the words "if any" had been inserted in His Honor's decree, so that no possible injury or injustice might accrue to the Defendant, if it should be found that the quantity of land retained was so trifling as not to entitle the Plaintiff to compensation.

1831.

July 16.

PHILLIPS v. WORTH.

Where Defendants, who had been imprisoned under an attachment which was afterwards set aside for irregularity, commenced actions against the Plaintiffs to recover damages for false imprisonment, the Court stayed the actions, on the terms of the Plaintiffs paying to the Defendants their costs at law, and of the application to stay, and directed a reference with respect to a proper compensation for the injury which the Defendants had suffered.

MR. *PEPYS* and Mr. *Dixon* applied for an order to restrain two of the Defendants from prosecuting actions, which they had severally commenced against the Plaintiffs. The actions were brought to recover damages for the injury alleged to have been sustained by imprisonment under an attachment which the Court had afterwards set aside on the ground of irregularity.

Sir *E. Sugden* and Mr. *Duckworth* insisted, that on the authority of *Frowd v. Lawrence* (a), and on general principles, the Plaintiffs were not entitled to the order, unless the Defendants were allowed all their costs; and that a reference should be directed to the Master, to inquire and state, whether any and what compensation ought to be made to the Defendants, for the injury they had sustained in consequence of their illegal imprisonment.

The LORD CHANCELLOR directed, that upon the Plaintiffs' submitting to pay the Defendants their costs at law, and also the costs of the present application, the legal proceedings should be stayed; and that it should be referred to the Master, to inquire and state to the Court what compensation ought to be made to the Defendants respectively, on account of their imprisonment.

(a) 1 *Jac. & W.* 655, *Bailey v. Devereux*, 1 *Vern.* 269.; and see *Ex parte Clarke*, 1 *Russ. & Mylne*, 565., *Aston v. Heron*, 2 *Mylne & Keen*, 390.

1831.

WELLESLEY v. The DUKE of BEAUFORT.

July 28.

Mr. LONG WELLESLEY'S Case.

THIS was a motion on behalf of Mr. *Long Wellesley*, the father of the infant Plaintiffs, and now a prisoner in the custody of the Serjeant-at-arms for a contempt, that the order for his commitment might be discharged, on the ground that, as a member of the House of Commons, he was protected from attachment by the privilege of Parliament.

Privilege of parliament is no protection against an attachment for any contempt which is of a criminal and not of a civil kind.

The general nature and object of the suit are stated in Mr. *Russell's* report of the case of *Wellesley v. The Duke of Beaufort*, upon the question relative to the guardianship of the infant Plaintiffs. (a) Mr. *Long Wellesley* was not himself a party to that suit. The particular circumstances out of which the present application arose are detailed in the order sought to be discharged.

The clandestine removal of a ward of Court from the custody of the person with whom such ward has been residing under the authority of the Court, is in its nature a criminal contempt.

The order in question which bore date the 16th day of *July* 1831, recited that by an order of the 9th *November* 1825, it was ordered that the Master should approve of a plan for the education and residence of the infant Plaintiffs, and that Mr. *Long Wellesley* their father should be restrained from interfering with them in their then present situation; that by another order of the 1st of *February* 1827, the Master was directed to inquire and report to what persons, other than Mr. *Long Wellesley*, the custody of his children, the infant Plaintiffs, and the

A member of the House of Commons, who had carried off his infant daughter, a ward of the Court, from the house of the ladies under whose care she had been placed by the guardians appointed by the Court, and who on being personally ex-

(a) 2 *Russ.* 1.

amined by the Court admitted the fact, and refused to state the present residence of his daughter, was ordered to be committed to the *Fleet*, although he was not a party to the suit.

1831.

*Mr. Long
WELLESLEY'S
Case.*

the care of their maintenance and education should be committed, and it was ordered that Mr. *Long Wellesley* should be restrained from removing the said infants, or any of them, from the care or custody of the Misses *Long*, and that such order had on appeal to the House of Lords been affirmed; that by another order dated the 21st of *August* 1829, it was ordered that the custody of the infant Plaintiffs, and the care of their maintenance and education, should be committed to the Duchess of *Wellington* and *William Courtenay*, Esq., as their guardians, with full discretion as to the course and system of the said infants' education, the persons with whom they should respectively reside, the persons to whom the immediate superintendence of their education should be committed, and the place of their residence. The order went on to state, that the female infant Plaintiff was accordingly placed by her said guardians under the care of the Misses *Long* her maternal aunts; and it then set out the affidavit of *Henry Bicknell*, the house steward of the Misses *Long*, from which it in substance appeared that while the female infant Plaintiff was residing with the Misses *Long* at *Unsted Wood*, near *Godalming*, in *Surrey*, her father Mr. *Long Wellesley*, accompanied by other persons, came to their residence in the evening of the 15th of *July* 1831, and in the absence of the Misses *Long* conducted the infant Plaintiff his daughter to the carriage of the infant Plaintiff his eldest son, in which, after some opposition on the part of the Misses *Long's* servants, he drove off with her, and proceeded to *London*. The order next recited that, it having been therefore prayed by Sir *E. Sugden* that Mr. *Long Wellesley* might be forthwith committed to the *Fleet*, and the female Plaintiff delivered up, it was ordered that the Serjeant-at-arms should *instantly* proceed to the residence of Mr. *Long Wellesley*, and demand the said infant Plaintiff, and bring

1831.

Mr. LONG
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Case.

ring her to the bar of the Court, and that the rest of the motion should stand over until the return of the Serjeant-at-arms and the attendance of Mr. *Long Wellesley* in Court, either by counsel or in person: and then, after reciting that the Serjeant-at-arms had now returned and informed the Lord Chancellor that he had been to Mr. *Long Wellesley's* house and had seen him, and that he (Mr. *Long Wellesley*) had stated that the said female infant was not there, nor should he say where she was, the order proceeded thus—"Whereupon Sir *E. Sugden* renewing his application for the committal of the said *William P. T. Long Wellesley*, and the said *William P. T. Long Wellesley* being now present in Court, and admitting that he had read the affidavit above stated, and declining to have time allowed him to answer the same, and being in person examined by the Lord Chancellor on his attestation of honour, the Lord Chancellor by special courtesy, waiving to examine him upon oath in the usual manner, and the said *William P. T. Long Wellesley*, answering upon his honour "that he does not know where the said infant at this moment of time is;" but admitting at the same time that he has removed the said infant from the house of the said Misses *Long*, as set forth in the said affidavit, and stating that he has given directions to his servants or agents to remove the said infant out of the jurisdiction of this Court, and further stating, that he never would bring the said infant again within the jurisdiction of this Court, — His Lordship does declare the conduct of the said *William P. T. Long Wellesley*, in removing the said infant Plaintiff, as set forth in the said affidavit, and in concealing the present residence of the said infant, to be a contempt of this Court; and his Lordship doth further declare the conduct of the said *William P. T. Long Wellesley*, in forcibly and without consent removing the infant ward of this Court, the king's subject, beyond the realm, and his refusal

now

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cases of Lady *Wenman* (a) and Lord *Roscommon* (b), which had been mentioned, the committee did not consider to be conclusive; the former being that of an *Irish* peeress who in the 7 G. 1. was committed for a contempt by the then Lord Chancellor, and was at that time entitled to no privilege in *England*; while the latter was that of an *Irish* peer in the 10 G. 4., who under the Act of Union was clearly entitled to privilege of peerage; but as the order for his commitment for a contempt, though made by the Lord Chancellor, had never been executed or even taken out of the registrar's office, no opportunity occurred for questioning it in the House of Lords, the only tribunal which could decide on the extent of that privilege. The report then proceeded as follows:—

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“The case of the *Countess of Shaftsbury*, 10 G. 1. (c), in some respects resembles the present. The Court there directed a sequestration, but did not attempt to commit a peeress who had contrived and effected the marriage of her son, an infant of the age of fourteen years, without the consent of his guardian. Your committee, having failed to discover any instance in which a member of either house of parliament had been imprisoned for a contempt, except by the authority of the house to which he belonged, since the early cases above referred to which are imperfectly reported, have proceeded to consider this case on the grounds of analogy and of intrinsic merits.

“The same principle, on which it has been resolved by the House of Lords that privilege shall not prevent the

(a) 1 *P. Wms.* 701.

(c) 2 *P. Wms.* 102.

(b) Before Lord *Lyndhurst*,
1830.

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the courts of law from enforcing obedience to a writ of *habeas corpus*, seems to require by analogy that the Lord Chancellor should possess equal powers for the protection of the wards of the Crown committed to his charge, and should be enabled to exercise the most prompt and effectual means to prevent them from being withdrawn out of his jurisdiction. The committee find the right of courts of law to commit privileged persons for some highly criminal contempts strongly asserted by different writers, particularly by *Blackstone* and *Hawkins*. Attachment for criminal contempt has been described as a judgment and execution, the conviction of an offender by a court of competent jurisdiction, and the award of a sentence for his offence. Your committee, therefore, conceive that the present case falls within the principle under which persons committing indictable offences have been considered not to be entitled to privilege.

“Under all the circumstances of the case, the committee have come to the following resolution; that Mr. *Long Wellesley*'s claim to be discharged from imprisonment by reason of privilege of parliament, ought not to be admitted.”

The motion to discharge the order of the 16th of *July* now came on in the Court of Chancery; and Mr. *Wellesley*'s leading counsel, the *Solicitor-General*, having declined to argue the case, after the report of the committee of the House of Commons, his junior, Mr. *Beames*, was heard by the indulgence of the Court, as *amicus curiæ*, in support of the application.

It appeared that at the time when the abduction of the infant Plaintiff took place, she was, strictly speaking, without any guardians appointed by the Court; for the
 Duchess

Duchess of *Wellington* had died about three months previously, and no new appointment had been made; and as the office of joint guardian does not survive (a), the guardianship of Mr. *Courtenay* was also determined. It was, however, assumed throughout the discussion that, as the young lady had been placed under the care of the *Misses Long* by the authority of the Court, and as the order (b) by which Mr. *Wellesley* was restrained from removing her from the care and custody of those ladies was still in force, this accidental circumstance did not affect the question respecting the contempt.

1831.
Mr. Long v.
Wellesley's
Case.

Mr. *Beames*.

The proposition which I mean to contend for is, that there is no jurisdiction in this Court to commit Mr. *Wellesley* for a contempt, inasmuch as he is a member of parliament; and in discussing the question it may be convenient to consider how the matter stands, first, at common law, next upon the statute law, and lastly with reference to the cases in this Court.

Innumerable cases occur in the old books, especially the year books, all establishing the position that a member of parliament is not liable to be arrested or imprisoned save in three cases only; namely, felony, treason, and breach of the peace; but instead of travelling through those cases, it will be sufficient to come at once to the authority of Lord *Coke*, who, in his fourth Institute (c), takes notice of this as an undoubted privilege of a member of parliament, and lays down the doctrine in the words already stated, that a member of parliament cannot be arrested or imprisoned but in the three cases of treason, felony, and breach of the peace.

In

(a) *Bradshaw v. Bradshaw*,
11 Mod. 128.

(b) See this Order, 2 *Russ.* 44.

(c) 4 *Inst.* 24, 25.

1831.

**Mr. Long
WELLESLEY'S
Case.**

In that passage Lord *Coke* adverts to the Court of Chancery, for he expressly says, referring to the case of a *subpoena*, that the same rule applies to courts of equity; and he observes that the privilege is not confined to the member of parliament, but extends equally to his servants. Indeed he goes further; for he also says with reference to the goods and chattels of a member of parliament, that they are not to be distrained, as he expresses it, "during his privilege."

Lord *Coke* in a previous part of his work had occasion to consider what is always spoken of as the *lex parliamenti*; and in his first Institute (*a*), in enumerating the different laws which prevail, he mentions it by that name. Nor do these passages stand unsupported and alone. They have been recognised in the celebrated case of *Regina v. Paty* (*b*), in which though Lord *Ellenborough* differed from the other judges on some points, he expressly refers to the passages cited from Lord *Coke* as establishing that the *lex parliamenti* forms part of the law of this land, and that the privilege of members of parliament prevails in all but the three cases of treason, felony, and breach of the peace.

The comparatively recent case of *John Wilkes*, in which under a warrant issued by the Secretary of State *Wilkes* was committed to the Tower and afterwards brought up before the Court of Common Pleas, furnishes an illustration of the same general doctrine. In that case, two objections taken to the form of the warrant were over-ruled by the Court; but a third objection, that *Wilkes* was a member of parliament, had its effect, and he was accordingly discharged. Lord *Camden*, who at that time presided in the Court of Common Pleas,

(*a*) 1 *Inst.* 11 *b*.

(*b*) 2 *Raym.* 1105.

Plea, in giving judgment (a) expressly refers to the passage in the fourth Institute; and he lays it down broadly that in every case except treason, felony, and breach of the peace, the privilege prevails; in other words, that courts of law are bound to suspend the exercise of their jurisdiction in every case in which a member of parliament is concerned, except in the three cases of treason, felony, and breach of the peace.

1831.
Mr. Lord
Willesley's
Case.

It may therefore be assumed, without citing a multitude of other cases which were expressly recognised by Lord Holt in *Regina v. Paty*, and which are brought down to modern times by the decision in the case of *John Wilkes*, that the law corresponds with the doctrine laid down by Lord Coke. Lord Holt, in delivering judgment in *Regina v. Paty*, very emphatically expressed his opinion with respect to parliamentary privilege; a circumstance the more important because his Lordship does not appear in that judgment to have been by any means favourable to such privilege as was supposed to exist in that case in favour of members of the House of Commons. His language is, "The privileges of the House of Commons are well known; they are founded on the law of the land; and are nothing but the law:" and he continues, "when a matter of privilege comes in question in *Westminster Hall*, the judges must determine it. We must take notice of the law *parliamenti*. Lord Coke, in his first Institute, enumerates it as the law of the land." (b)

In another case of frequent reference, *The Executors of Stewys v. Chamond* (c), the question was, whether a member

(a) 2 Wils. 159.

(c) 1 Dyer, 59 b.

(b) 2 Rayn. 1114.

1831.

 Mt. Leone
 v. Attorney's
 Case.

member of parliament was privileged from arrest; and in the discussion that took place the Court pointed out the principles upon which the privilege is grounded. The Court considers the attendance of a member of parliament in his place as of great importance to the state; for the state has an interest in the due discharge of the duties of every member of parliament in his place in parliament; and that interest is paramount to every other, and only gives way in the three excepted cases of treason, felony, and breach of the peace. In those particular instances in which the privilege is made to yield to the criminal law, it is a choice of evils; the law probably considering that a person who has committed a crime is not altogether a fit person to be the representative of others, or perhaps that the state itself could not exist if crime were not to be reached in any individual. But upon whatever notion the exception is founded, it is certainly understood that in those three particular cases, and in no others, the privilege gives way to the law. This subject was much discussed in the case of *Holiday v. Pitt* (a), where ten out of the twelve Judges were decidedly in favour of the privilege, and considered that since the statute of *William* (b) there could not be a doubt of its existence. The subject was also considered in an old case of *Hodges v. Moor* (c), where the Court was of opinion that the privilege existed in all civil cases. In *Hodges v. Moor* allusion was made to *Thorpe's case*, in which it was admitted that parliament, though it did not stay the proceedings of the King's courts, privileged the persons of its members; and it is well known to be the doctrine of the courts of common law, and acknowledged as such by the writers on the subject, among others

(a) 2 *Stra.* 985.

(c) *Noy.* 85. *Latch.* 48. 150.

(b) 12 & 13 *W. 3. c. 3.*

others by Mr. Tidd, that a *capias* on a judgment at law cannot be had against a member of parliament.

1831.

*Mt. Leno
Wallcutt's
Case.*


Upon these authorities it is submitted that, at common law, the privilege is clear: that all these cases, and innumerable others which might have been cited to the same effect, establish the proposition that there is no jurisdiction in civil matters in any of the courts of law or equity against a member of parliament, so as to enable a judge to commit him; and that there is jurisdiction in criminal matters in the three cases put of treason, felony, and breach of the peace.

Adverting next to the manner in which the privilege has been dealt with by statutes, it is sufficient to observe of all of them, (1 Jac. c. 13., 12 & 13 W. 3. c. 3., 11 G. 2. c. 24., and 10 G. 3. c. 50.) what the whole frame and language of their several provisions evidently shew, that they were passed for the purpose not of enlarging, but restricting the common law privilege; and in that light, indeed, the Court regarded them in the case already cited of *Holiday v. Pitt (a)*; and, farther, that the immunity from arrest of persons entitled to the privilege of parliament is distinctly recognised and reserved in every one of them. These statutes, too, apply to courts of equity as well as to courts of law; for the enactments refer indiscriminately to suits and actions, and speak of proceedings in courts of equity and in the Court of Chancery, in such a manner as to prove that no distinction was contemplated or supposed to exist between legal and equitable proceedings in this respect.

The cases in equity upon the subject are not so numerous as at law. But all the books of practice concur in

(a) 2 Stra. 985.

1891.


 Mr. LONG
 WILKINSON'S
 Case.


in laying down the proposition that, in the case of a peer or member of parliament, the person cannot be touched. The Court, however, has not left the party aggrieved altogether without a remedy, but it has given him a remedy of a different and peculiar kind: it does not permit him to impound, so to speak, the person of a refractory member of parliament, but it enables him to compel obedience to the decree of the Court by means of a sequestration.

The high authority of Chief Baron *Gilbert* distinctly recognises this doctrine in his *Forum Romanum* (a), where he states the practice as applicable to a peer and member of parliament to be by sequestration. The general orders of this Court make some curious distinctions upon the subject of beating the person serving the process of this Court; — how far the contempt is sufficiently evidenced by one witness, in what cases the evidence of two is required, and other similar questions, which *Gilbert* discusses elaborately (b); and in the course of his discussion he puts the case of a peer *abusing* (which is a very high contempt of this Court) the officer who serves its process; and in that particular instance he says the peer cannot be committed. The words of *Gilbert*, which are general and may apply either to opprobrious language or to personal violence, are as follows:—
 “But a nobleman or peer of this realm may abuse the party who serves the process upon him, *toties quoties*, for his person being sacred, the Court cannot come at him as they do in the case of a commoner, *quod est durum*.” If that, however, be the law, the hardship cannot affect the question. In another passage, putting the case of a breach of decree, he says, that for breaking a decree, or non-appearance, or want of an
 answer,

(a) p. 67.

(b) *For. Rom.* 212.

answer, you may sequester the real and personal estate of the party, as is used and practised where the Defendant is a peer of this realm; but shall not arrest or imprison the body of any of the knights, citizens, or burgesses, or other privileged persons, during the continuance of privilege of parliament.

1881.

 Mr. Long
 WELLESLEY'S
 CASE.

In the older Chancery Reports, there are a few authorities, not perhaps very explicit, but still amounting to a recognition of the rule in equity, that the person of a member of parliament cannot be touched, except in treason, felony, and breach of the peace. Of these one of the earliest is an anonymous case (a) in the year 1676, which lays it down broadly that the widows of peers are exempt from arrest. The inference is that as they were exempt, their husbands must have been exempt likewise. The marginal note of *Pary v. Juxon* (b), a case in the year 1669, states that a member of convocation had the same privilege as a member of parliament, without specifying what that was; an acknowledgment, however, that there was some privilege enjoyed by the latter. In the year 1666 (c) a motion was made before Lord Keeper *Bridgman* against a member of parliament for an injunction for want of an answer: the injunction was granted, but the Court ordered that an attachment should not be entered against the Defendant, he being a member of parliament. In the year 1685 (d) it was laid down, that the Court will not proceed against a member that has privilege of parliament, yet if he sue at law the Court will enjoin him until he answer.

These cases establish the proposition that, as against a member of parliament, the old practice of the Court was

(a) 2 Ch. Ca. 224.

(b) 3 Ch. Rep. 38.

(c) 3 Ch. Rep. 12.

(d) Anon. 1 Vern. 529.

1681.

Mr. Lene
Wellesley's
Case.

was never to issue any process which touched the person.

The next is a case frequently referred to, *Eyre v. The Countess of Shaftsbury* (a), in which a sequestration was issued against the Countess of Shaftsbury. The offence of that lady was of a much higher nature than the offence of Mr. Wellesley. Mr. Wellesley, it may be assumed, is in a situation to put himself *rectus in curia*, by restoring his daughter to the Court; and when he has restored her, he will have cleared his contempt, and will be no longer considered a fit object of punishment. But the Countess of Shaftsbury never could restore the parties to their original condition. She had committed one of the gravest offences which a person can commit against a court of equity. She had actually married, or conspired at, or assisted in, or procured the marriage of a ward of court. She was, therefore, in a situation infinitely more penal, so to speak, than Mr. Wellesley; because, whatever submission she might make, she was no longer capable of undoing the mischief she had done. Yet, even in that state of circumstances, the Court did not commit her, but was satisfied with merely issuing a sequestration. Recourse was had to the common and ordinary mode of proceeding against a peer, that of sequestrating the property, — sequestrating it of course as a punishment only, for there was nothing further for the Countess to do. The sequestration could not possibly be used there, as it might be used most beneficially in the present instance, in order to prevent a mischief, and to restore the parties to the same situation in which they were before the particular offence was committed. The object, therefore, was simply punishment; and although there was every motive for punishing Lady Shaftsbury with

(a) 2 P. Wms. 102. Gilb. Eq. Rep. 172.

1881.

Mr. Long
Williams's
Case.

with the utmost severity, that the example might strike terror into the minds of others, and deter them from the commission of a similar offence, the Court never attempted to commit her person, but contented itself with sequestrating her property. That case is reported by Chief Baron *Gilbert*, as well as by *Peere Williams*, and the reports differ in no essential respect, except as to the case of *Annesley v. Annesley*, to which they both refer. From the statement of *Peere Williams* the inference would be, that Lord *Annesley* was committed; but from *Gilbert's* report it is plain that the fact was otherwise, and that the Court had only recourse to its usual proceeding of a sequestration; and there also it must have been inflicted in the way of punishment. It may be remarked, too, that Lord *Macclesfield*, who decided *Lady Shaftsbury's* case, was a judge on all occasions disposed not only to exercise his jurisdiction, but to carry it to its utmost verge; for he conceived that the jurisdiction was most salutary, and that its usefulness was only to be proved by his exercising it rigorously and effectively.

The proceedings in *Ex parte Hopkins (a)* were subsequent to *Lady Shaftsbury's* case, and after Lord *Macclesfield* had presided in this Court for a considerable period. In that case, a merchant had left his fortune, which was considerable, to two nieces, whom he had brought up in his house, and he appointed certain persons to be his executors. The nieces were living with one of the executors, a relation of the name of *Hopkins*; and the father, who was a very poor man, and who probably thought his paternal power might in that instance be very usefully exerted, for the purpose of getting

(a) 3 P. Wms. 152.

1831.

Mr. Lons
Macclesfield's
Case

getting a sum of money to induce him to suspend it, become, or represented that he was anxious to obtain possession of his children, and to remove them from the executor, in whose custody they were. Lord *Macclesfield* felt very great doubt whether he could entertain the question upon petition; but he so far acknowledged the paternal power as to say, — and it is with that view the case is referred to, — that the father was justified in taking his daughters how he could, having an undoubted right to the guardianship of them, provided he did not commit an actual breach of the peace in such an attempt.

It may, perhaps, be said that in the present case a breach of the peace was committed; but after the opinion intimated by the Court, that the exception with respect to privilege, as laid down by Lord *Coke*, has reference only to such breaches of the peace as may become the subject of legal proceedings before a tribunal which can regularly take cognisance of them, it is needless to pursue that topic farther. A fourth head of argument might have been found in the decisions of the House of Commons itself upon questions where its own privileges have been concerned, and as to which it has always reserved to itself a right to judge; but after the recent resolution of the Committee in this very case, it becomes unnecessary to enter upon that discussion.

The LORD CHANCELLOR.

If a court of law or of equity, upon due deliberation, entertains an opinion that a member of either house of parliament has privilege of parliament, that Court is, in my judgment, bound to give him the benefit of his privilege, and to give it him with all its incidents, even
although

although the house to which he belongs abandons it as a claim of right; for a court knows nothing judicially of what takes place in parliament till what is there done becomes an act of the legislature.

1881.
Mr. Lord
Warriston
Gard

Mr. Beames.

The only other point to be adverted to relates to the contempt itself. Considering the subject in the abstract, and laying the particular facts entirely out of view, the first observation is that the Court makes no distinction between civil contempts, if I may so express myself, and criminal contempts. The Court makes a considerable distinction between what are, in its own language, termed aggravated contempts, and those not of an aggravated description. In the case of a party setting the power of the Court at defiance, and refusing to do an act of justice, which he has been required to do, to his opponent, which is an aggravated contempt, the Court has gone a great length. Even in the time of Lord Bacon, as the orders shew, the Court has put the party so acting into strict confinement. And there is a case in *Tothil* where that confinement appears to have been of a very severe nature.

Nothing, however, can be found in the orders of the Court to justify a distinction between civil and criminal contempts. Indeed the very exposition which to-day has been given of the rule, as laid down by Lord Coke, would render it impossible, consistently with that doctrine, to make any difference between them, or to hold that, without the intervention of a jury, without that fair mode of trial which a person charged in a criminal sense is legally entitled to, a party, possibly a very poor and helpless individual, may be exposed to a contest single-handed against all the powers of the Great Seal.

The

18342
 Mr. Beames
 Walsley's
 Case.

The only distinction taken, has been between simple disobedience and disobedience of an aggravated kind; and the Court attaches terms and a penalty to the latter, which it does not do to the former. But the object in every case is the same, — to effect a compliance with the orders of the Court; and when that object has been attained, on payment of costs, and submitting himself to the power of the Court, the party is generally set at liberty. This is illustrated by the course adopted in the instance of a person marrying a ward of Court. The officer is there sent to take the party into custody: the party is committed; but the moment the settlement is signed, he is set at liberty on paying the costs. The Court, therefore, uses the power of committing for a contempt, not as a means of punishing a criminal act, but only for the purpose of enforcing obedience to its rules, orders, and decrees.

The LORD CHANCELLOR.

I am exceedingly well pleased that I took the course which I saw fit to take, and which I thought the interests of justice prescribed, without any deviation from the strictest rules in force here, as well as in all other courts, with respect to the hearing of counsel. In conformity with those rules I suffered Mr. *Beames* to address the Court as *amicus curiæ*, upon a question so grave in itself and so nearly touching the liberty of the subject. This practice has been frequently adopted in matters resembling the subject of the present discussion. It is not unusual in the Court of King's Bench, which, in the exercise of its high criminal jurisdiction, is wont to let in the light to be obtained from such arguments, that a failure of justice may be prevented.

I am the better satisfied with having taken that course in this case, because Mr. *Beames* has, in an exemplary manner,

manner, abstained from abusing the indulgence which I gave him. He has confined himself most rigidly to the question which he endeavoured to illustrate; he has abstained from all that did not come strictly within the scope of that permission; he has stated the argument with his usual distinctness and acuteness, and with very great succinctness indeed, considering the extent of the field over which he had to travel, and the variety of learning, more or less bearing on the subject, which he must have gone through in his own researches. In a word, he has exercised the delicate office of *amicus curiæ* with great correctness and precision.

1831.

Mr. Lushington
W. Lushington
Case.

If, upon hearing Mr. *Beames*, I had found he threw any new light upon the question, which may now be said to be under consideration after a fortnight's discussion, elsewhere as well as here; if he had imported into the consideration of it any fresh authorities, or any hitherto uncited cases, I should undoubtedly have paused to give the party, on whose behalf substantially he has addressed me, the benefit even of possibilities and doubts. But it is no disparagement of Mr. *Beames*'s learning or industry to say that he has failed to bring novelty into a discussion of so long standing that it may well be termed *verata*: that he has failed to add any thing new, only because such an addition would inevitably have been departing from the matter which was appropriate to the discussion; only because it had been exhausted by his predecessors, and because no man could hope to be original in it without also being erroneous.

Therefore, although leaning, as I ought to do, towards the gentleman on whose behalf it has been attempted to raise a doubt, I yet feel no obligation on my part to delay the expression of my opinion upon the legal and constitutional point now made.

The

CASES IN CHANCERY.



The old authorities upon the subject of parliamentary privileges are to be taken with very ample allowance, for they all refer to times, and exist in circumstances, wherein the claim of privilege by members of parliament was infinitely larger than any thing upon which both houses now are content to rest. One can hardly open a book under the head of parliamentary privilege without being satisfied of the truth of this proposition. In the very volume of *Peere Williams*, from which the *Shaftsbury* case has been quoted, it is laid down in *Lord Clifford's* case (a) that the first process against a peer of the realm, or against a person having privilege of the lower house as a knight of the shire, or as a citizen or burgess, is sequestration. But in another case (b) in the same book, without a name and equally without authority in these days, it is stated that the same exemption extends to the menial servants of peers, and that the first process in their case also for contempt of court (for no exception is made) is not by arrest of the body but by sequestration. This, too, was so ruled after the statute of *William* (c) in restraint of privilege; and the right must indeed have existed after that act, if the privilege ever existed in those menial servants, just as it did before the act; for the statute saves the rights of all persons then having privilege, and makes no difference in its enactments between the case of the master and that of the servant. (d)

To bring authorities either from the records of parliament, or indeed from the records of courts in times when privilege was so much larger than is now contended or even thought of by the stoutest champion of parliamentary

(a) 2 P. Wms. 385.

(c) 12 & 13 W. 3. c. 3.

(b) *Anon.* 1 P. Wms. 535.

(d) See 10 G. 3. c. 50.

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mentary rights, —so much more extensive that it might be said to be a different, rather than the same claim, — is manifestly of no use in disposing of the practical question now before us.

1831!
Mr. L. L. L.
W. L. L.
C. L. L.

But if any one wishes to see how far the pretensions of the houses of parliament have formerly been carried, to know how incumbent it is upon the courts of law to defend their high and sacred duty of guarding the lives, the liberties, and the properties of the subject, and protecting the respectability and the very existence of the Houses of parliament themselves, against wild, and extravagant, and groundless, and inconsistent, notions of privilege, it would be sufficient to refer, not to the times of the *Plantagenets*, of the *Tudors*, or of the *Stuarts*, the records of which abound in extravagant *dicta* of the courts, and yet more extravagant pretensions of the two houses, but to a much later and more rational period of parliamentary history — to the days of the family under whom happily all classes in these realms have so long enjoyed, each in its sphere, the rights of freemen.

In the year 1759 an action of trespass for breaking and entering a fishery was tried in the House of Commons, to the lasting opprobrium of parliamentary privilege, to the scandal and disgrace of the house of parliament that tried it, and to the astonishment and alarm of all good men, whether lawyers or laymen. Admiral *Griffin* made complaint to the House whereof he was a member, that three men, whose names were stated, had broken into and entered his fishery near *Plymouth*, had taken the fish therefrom, and destroyed the nets therein; and the House forthwith, instead of indignantly and in mockery of such a pretension dismissing the charge and censuring him who made it, ordered the defendants in the trespass, for so they must be called, to be com-

1881.

**Mr. LONG
WELLESLEY'S
Case.**

mitted into the custody of the serjeant-at-arms. They were committed into that custody accordingly; they were brought to the bar of the House of Commons, and there, on their knees, they confessed their fault; they promised never again to offend the admiral by interfering with his alleged right of fishery; and upon this confession and promise they were discharged on paying their fees. So that by way of privilege, a trespass was actually tried by the Plaintiff himself sitting in judgment against his adversary the Defendant, and the judge (for in this case the House and the complaining party must be considered as identical) was pleased to decide in his own favour. (a)

This is enough to warn courts of justice how they accede to claims of privilege the instant they hear that once magical word pronounced. Even in the event of the House of Parliament, by their Committee's report and by their votes, having decided in favour of so monstrous a pretension, I should still have deemed it my duty, if, the facts of the case authorised me, to act as I am now prepared to act, or rather to continue acting. If, instead of justly, temperately, and wisely abandoning this monstrous claim, I had found an unanimous resolution of the house in its favour, I should still, (and it was this which made me interpose to assure the counsel that I needed not the resolution of the House of Commons in favour of the Court of Chancery,) I should still have steadily pursued my own course, and persisted in acting according to what I knew to be the law.

Having disposed, generally speaking, of the authorities of those early days by these observations, I must, how-

(a) *Commons' Journals*, vol. xxviii. pp. 489. 550. The Journals of that period abound with cases of a similar kind. See 2 *Mylne & Keen*, 395.

however, remark further that I can find no cases in the books to justify the assertion of privilege now made. I speak not of the records of parliament, but confine my proposition to judicial authority. This distinction I feel myself, after mature deliberation, authorised and bound to take. For let not any one imagine that when I at once and without argument ordered *Mr. Wellesley* to be committed to the Fleet, well knowing at the time that he was a member of the House of Commons, I was taken unprepared, or expressed a rash or unadvised opinion. The case was familiar to my mind. I had seen it in every form; I had heard it discussed in every shape; I had seen it in the court of parliament; I had encountered it in the courts of law. In all those courts I had borne a share in the discussion; having myself argued the greatest of all the cases (a) when it came by writ of error from the Courts of King's Bench and Exchequer Chamber before the highest judicature of the realm, the House of Lords, sitting as a court of law. The result of that deliberation and attention has been confirmed in my mind by more recent inquiry, and by again going over the ground I had so often previously trodden; and the conclusion I have come to is, that there is no ground whatever to maintain the claim of privilege now set up.

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Mr. LONG
WELLESLEY'S
Case.

To those who argue on the other side I at once make a present of almost all that *Mr. Beames* urged this morning, as to commitments for refusing to put in an answer, for refusing to pay money ordered to be paid, for resisting a decree to perform any specific act, for cutting down timber (b), or doing any other act in the face

(a) *Burdett v. Abbot, Burdett v. Colman*, 5 Dow, 165. the Lord Chancellor affirmed an order by which it was directed that a sequestration should issue against the Defendant, Earl Ferrers,
(b) In *Shirley v. Earl Ferrers*, Lincoln's Inn Hall, July 15. 1831,

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Mr. LONG
WELLESLEY'S
Case.

face of an injunction, and in the face of any other order of this Court. The breach of any order, substantially of a civil description, and in a civil matter, that is, a matter touching the rights of real or personal property, will not entitle this Court, the Court of King's Bench, the Common Bench, the Exchequer of the King, nay, not even the House of Lords itself, judging in the last resort, to attach the person of the party having privilege of parliament, and disobeying such an order.


I leave for further observation that ingenious and acute part of Mr. *Beames's* argument where he takes the ground of denying the distinction between a civil and a criminal contempt; the only part of his argument in which I think he may be said to have thrown any new light upon the subject. I had, however, previously considered the question in this point of view; I had frequently heard it discussed, in the course of the former controversies; and it was not therefore now presented to my mind in this light for the first time.

Accordingly the ground on which I rest my denial of parliamentary privilege in the present case is not that taken by my Lord *Coke*, and by the oftentimes repeated resolutions of the House of Commons,—the proposition which makes the exception, but confines it to treason, felony, and surety of the peace, and maintains privilege in every other case. I have already, in the course of the argument, stated one reason why I cannot so restrict the privilege,—why I draw my line in another direction, or higher up upon the scale. If the only ground of commitment, by a court of competent jurisdiction to try the case, was that a breach of the peace had been committed,

ers, for cutting down timber in breach of an injunction, and that an agent of his lordship,

who had been a party to the same contempt, should be committed to the *Fleet*.

committed, the breach of the peace not being the main offence, but only incidental to it, and accidentally mixed up with it, — if that were the only ground, no court could commit for a contempt unaccompanied by a breach of the peace, however aggravated the criminality of that contempt might have been. And a second consequence would also follow, that this or any other court which had not jurisdiction of a breach of the peace could not commit at all. A justice of the peace could commit, the Court of King's Bench could commit; but the Court of Chancery, the Common Bench, or the Exchequer, could not commit, because they have no jurisdiction, no cognisance of the peace.

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There are, however, many offences, — and this is the other ground of my denying that to be the right distinction, — offences for which no man can doubt the right of the Courts of Common Pleas, of Exchequer, and of Chancery, to commit; offences for which till now their right to commit has never been disputed; offences involving no breach of the peace, and for which, by every day's practice, parties are committed by those courts, and by the Court of King's Bench, not sitting as a criminal court.

If the line is to be assumed which has been drawn by Lord *Coke* in the First Institute, and followed by the houses of parliament without, as it appears to me, duly weighing the subject matter, will it be said that a member of parliament can commit perjury without punishment? That is no treason, or felony, or breach of the peace: it is not even such an offence as for which you can have "surety of the peace," the expression used in some of the parliamentary resolutions.

It may be said, indeed, that a member of parliament is liable to an indictment for perjury in any court that

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has competent jurisdiction, and will, on conviction, be punished in his person by imprisonment. But upon this two material observations arise: First, if breach of the peace, treason and felony, alone give to any court a right to take the body of a person having privilege of parliament, where is that qualification of Lord *Coke's* rule, or of the resolutions of the Commons, to be found, which entitles a court after trial and conviction to touch the person of the privileged man? From the beginning to the end of the parliamentary discussions on the subject, there is no distinction taken between mesne process and the execution of a sentence. And yet, if the limit of the rule of privilege is to be taken from the text of Lord *Coke*, or from the resolutions of the houses of parliament, no member of parliament could be imprisoned even upon a conviction for perjury by virtue of a judicial sentence legally pronounced. But the second observation renders the accuracy of the first immaterial. What shall be said of a crime nearly equal to perjury as to its effects in defeating the ends of justice, a crime which, though not in a technical sense equal, is yet in all other respects the same with perjury, I mean prevarication upon oath? If the prevarication amounts to all that moral perjury can reach, either in mischief or in guilt, if a man has twenty times over in his cross-examination told a falsehood, and his next breath has operated his own conviction of that falsehood, unless it be upon a point material to the issue to be tried, it is not perjury in law. What do the courts, when that foul crime is committed in their face? They do not order the party to be indicted for perjury, as he would be if he had sworn falsely to a thing material to the issue — because they know that he must then escape upon a trial; but they order him to stand committed for his prevarication. In what form, and under what name? *For a contempt of the court by prevaricating on his oath.* If in the Court of King's Bench a member of parliament should


should so far forget his honour as a representative, and his duty as a man, as to prevaricate grossly on his oath, was it ever dreamt he would be at liberty to say, "true, I have prevaricated; but I am a knight of the shire, I am a citizen, or I am a burgess in parliament; true, it is, I have done that which degrades and disgraces me, that which is the most flagrant attempt that can be made to defeat the administration of justice; true, it is, I have done that for committing which any other man would have been hurried from hence to a dungeon; but I am a member of the House of Commons; I have privilege of parliament, and my person is as sacred as the oath which I have taken and broken."

Were any man so ill advised as to offer such an insult to the Court, far from operating to his protection under this privilege, it is my firm belief, it is my fervent hope, that it would make him cease to be a member of parliament by expulsion. But it is also my belief that it would, in the first instance, be visited with condign punishment by the Court whose dignity had been outraged; and that, long before the house which he had disgraced had thrust him forth, the Court would vindicate its insulted honour, and reject with scorn the plea of privilege by which he had aggravated his offence.

The line, then, which I draw is this;—that against all civil process privilege protects; but that against contempt for not obeying civil process, if that contempt is in its nature or by its incidents criminal, privilege protects not: that he who has privilege of parliament, in all civil matters, matters which whatever be the form are in substance of a civil nature, may plead it with success, but that he can in no criminal matter be heard to urge such privilege: that members of parliament are privileged against commitment, *quâ* process, to compel

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them

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them to do an act;—against commitment for breach of an order of a personal description, if the breach be not accompanied by criminal incidents, and provided the commitment be not in the nature of punishment, but rather in the nature of process to compel a performance;—that in all such matters members of parliament are protected; but that they are no more protected than the rest of the king's subjects from commitment in execution of a sentence, where the sentence is that of a court of competent jurisdiction, and has been duly and regularly pronounced. Now convictions, and the sentences that follow upon them, are of two sorts; either formally, upon trial, by indictment or information and verdict, with the consequent judgment, or summarily, but as legally, as formally, by a commitment for contempt, where there is no other punishment provided, and no other mode of trying the offence.

In the case of the Earl of *Shaftsbury* (a) who, when committed by the Lords' House of Parliament, whereof he was a member, brought his writ of *habeas corpus*, Lord Chief Justice *Rainsford* in delivering the judgment of the Court, held that the Court had no right to consider the validity or the form of the warrant upon which the Earl had been committed. It was enough for that Court that a contempt was alleged, and an order of commitment made upon which the warrant proceeded; and the Chief Justice observed that if a party guilty of contempt could not be committed to prison, there was then no punishment at all with which he could be visited for his offence.

So, if the party here guilty of the contempt cannot be committed to prison, he must escape punishment
alto-

(a) 6 *State Trials*, p. 1269. *How. ed.*

altogether; for a breach of the peace is not necessarily incident to the contempt. And yet I should have committed just as much, had there been no breach of the peace, as if the offence of contemning the Court had been aggravated by the additional offence of an assault committed upon one of his Majesty's subjects.

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Walsingham
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There are cases indeed which go a good deal further, and which justify me in denying that what, in common parlance, may be called criminal contempt, must have been committed in order to oust the privilege. If the contempt savours of criminality, and the sentence is penal, that according to the books appears to be enough.

With respect to the distinction between civil and criminal contempts, denied by Mr. *Beames*, I agree that there may oftentimes be a difficulty in finding, first, authority for deciding where the line is to be drawn, and, secondly, instances in practice for drawing it. Yet that line has been recognised by the Court of King's Bench, in *Catmur v. Knatchbull* (a) and in *Walker v. Lord Grosvenor*. (b) The former was the case of non-performance of an award, made a rule of Court; for non-performance, being a disobedience, was a contempt of the Court, and so might be regarded as technically speaking and in form an offence. But the Court held that as it related simply to a civil matter, and was rather in the nature of process to compel the performance of a specific act, the matter was in substance not criminal but civil; and it refused to commit the Defendant, a member of parliament, for his disobedience. The same doctrine was laid down in the other case, where the non-compliance was by a peer.

But

(a) 7 T. R. 448.

(b) 7 T. R. 171.

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But suppose the matter to have been criminal, though without breach of the peace; suppose, for instance, an interruption or obstruction of the Court's business by a man, having privilege of Parliament, getting up and stopping the Court by a long harangue, by ribaldry, by invective, by slander, or by any other indecency which human wit may fancy, or human folly may practise, is it possible to doubt that the Court would order its officer to seize him forthwith and remove and commit him to confinement, as a person who, in the face of the Court, had been guilty of a contempt, of a criminal, and not of a civil kind? (a) Indeed if he was merely removed from the Court, that would be enough for the purpose of my argument; because the act of the officer and, consequently, of the Court itself — the bare act of taking the offender and putting him out of court is as much *imprisonment*, in contemplation of law, as if he had been thrown into the King's Bench prison. And if the party is privileged from being sent to prison, he is equally privileged from being turned out of court. Yet if the judges had not this power, about 1100 men would have the right to go and interrupt the business of all the courts in the kingdom. The business of Licensing Sessions and of Quarter Sessions in the country might be entirely put a stop to by one or two gentlemen in the county, who might happen to take an interest in obstructing the proceedings, and to be clothed with parliamentary privilege.

But it is not there only that such interruptions may take place. If these privileged individuals choose to carry

(a) A peer refusing to be sworn is guilty of a contempt for which he may be committed and fined. 2 *Salk.* 278. "No peer or lord of parliament hath privilege of peerage or of parliament against

being compelled by process of the courts in *Westminster Hall* to pay obedience to a writ of *habeas corpus* directed to him." *Lords' Journals*, vol. xxix. p. 37. *Rex v. Earl Ferrers*, 1 *Burr.* 631.

carry their political interference so far, the very business of the Court of Hustings and of the sheriff at elections, where they are not merely supposed but are almost assumed to take a deep interest, may be put an end to; so that, until we come to parliament itself, we should here have upwards of a thousand persons who would have the absolute right, uncontrolled by any power save that of the Houses to which they belong, of entering, individually or in a body, into those courts, and not only obstructing all election, but interrupting the administration of all civil and criminal justice.

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Nor is the argument *ab inconvenienti* less applicable to equitable jurisdiction than it is to the other branches of judicature. Who are the persons most likely to be guilty of those very offences which this Court is most frequently called upon to visit with punishment in order to protect its wards? If other Courts have a certain proportion of their suitors in Parliament, this Court, from the importance of the matters brought before it, has a much larger proportion there; and if there be any cases in which members of parliament—young commoners, and young lords—are more likely than others to become obnoxious to our jurisdiction, it is precisely in cases relating to the safety of heiresses and other wards. (a)

That

(a) That interfering with the custody, or secretly encouraging or abetting the marriage of a ward of Court, has always been regarded as a contempt in its nature criminal, and punishable as such by commitment during pleasure, see *Phipps v. Earl of Anglesea*, 1 *P. Wms.* 696., and *Kiffen v. Kiffen*, and *Dr. Yalden's Case* there cited; *Herbert's Case*,

3 *P. Wms.* 116.; *More v. More*, 2 *Atk.* 157.; *Anon. (Hughes v. Science)*, 2 *Atk.* 173.; *Smith v. Smith*, 3 *Atk.* 305.; *Butler v. Freeman*, *Amb.* 301., and the cases referred to in Mr. *Blunt's* notes; *Brandon v. Knight*, 1 *Dick.* 160., *Stevens v. Savage*, 1 *Ves. jun.* 154.; *Priestley v. Lamb*, 6 *Ves.* 421.; *Millet v. Rowse*, 7 *Ves.* 419., *Bathurst v. Murray*, 8 *Ves.*

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That case may still be supposed in real life which in the most finished part of the most excellent of his works the poet has so admirably described in the history of a travelled and accomplished profligate, of whom, when in the depth of his desperate fortunes,

“ Stolen from a duel, followed by a nun,”

it is added, as the means of retrieving him —

“ But if a borough choose him, not undone.”

And such are the men whom this arrogated privilege would suffer to enter within the precincts of this high court of judicature, and to revel in the contempt of the most delicate, the most important of the functions with which it is entrusted.

I have already given a reason why the authority of decided cases in favour of privilege goes for little, if drawn from times when the most extravagant notions of its extent were entertained ; but in the same proportion must any decision against privilege in those times be held so much the stronger in behalf of the law's authority. I will only refer to a case in *Levinz* which seems to me directly in point — a case never contradicted, never over-ruled, and calculated by decision to make an end of the argument. I allude to the case of *Wilkinson v. Boulton*, before the Court of King's Bench, when Lord *Hale* presided, and reported by Mr. J. *Levinz*. (a) To an action for false imprisonment there was pleaded a justification,
under

8 *Ves.* 74.; *Warter v. Yorke*,
19 *Ves.* 451. In the *Practical
Register* (p. 134. *Wyatt's* ed.) a distinction is taken between direct and positive contempts, for which the party may be punished by
(a) 1 *Lev.* 162.


being committed to the Fleet during pleasure, and ordinary contempts, where the commitment is only till the order of the Court be obeyed.

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under the custom of *London* for the Mayor and Aldermen to have the custody and guardianship of female orphans till twenty-one or marriage, and for any persons taking such from the guardian appointed by the Mayor and Aldermen, to be brought up before the Court and imprisoned. To this plea there was a demurrer on two grounds, the first of which is only material in so far as it drew from the Court a declaration that the matter was criminal for which the party had been imprisoned. The second ground was that the custom as alleged was ill, "because it is a custom to commit without exception of peers." This demurrer therefore raised the question distinctly, whether or not a peer could be committed for such contempt of the Court of Aldermen as consisted in taking an orphan out of the custody by them appointed; and the Court held it clear that a "peer is not privileged in this case" — I cite the book, — "*for in homine replegiando*, where he detains the body, he shall be committed;" and there was judgment for the Defendant, disallowing the demurrer. The authorities cited by the Court are the Year Book 11 *H.* 4. 15., and *Fitzherbert's Natura Brevium*, 68. C. The former was a case of *homine replegiando*, in which the sheriff had returned that the distress had been eloigned; and one point made was, that the party was a peer of the realm, "*issint que capias ne gist pas vers lui.*" But the Court took the distinction I have pursued here, and said "*en dett et trespas capias ne gist my vers un Count Baron et hujusmodi; per ceo que pur cause de lour estate, il est entend que ils ont assets, &c.; mes en cest case le tort que el fait, de ce que el ne suffre le replevin estre fait, est le cause que son corps sera pris, de quel estate que il soit;*" and reference is made to *Redman's* case, in the time of King *Richard*. The language of *Fitzherbert* (a) is equally precise; —

"If

(a) *N. B.* 155 C.


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“If there be,” says that writer “an eloignement returned by the sheriff, the plaintiff shall have a *capias in withernam* to take the defendant’s body, and to keep the same *quousque* &c., whether he be a peer of the realm or other common person.”


But I am content to rely on the case itself, decided by Lord *Hale*, and in the same age to which we owe the *Habeas Corpus* Act. It is a case peculiarly in point with the present. The authority with which privilege of peerage was assumed by the demurrer to come in conflict, was that of a city Court: the contempt for which it was alleged that privileged persons could not be arrested was taking away a ward of that Court. The Court of King’s Bench held that the peerage and its privileges afforded no protection in such a case; and to make the authority more applicable, the Court illustrated the decision by referring to the writ of *homine replegiando*, against which, if a peer was refractory, it was held to be clear that he must be committed; that is, if he eloigned the body of the villein or person sought to be replevied. Now Mr. *Long Wellesley* has here taken away and detained the ward of this Court; he has eloigned that ward. Is it saying too much to add that a privilege which could not protect a peer in the time of *Charles II.* against the authority of the Mayor’s Court, is still less capable in the present day of protecting a commoner against the authority of the Great Seal?

I have therefore the sanction of *Wilkinson v. Boulton*; I have the authority of the Year Book in the time of *Henry IV.*; I have the great authority of *Fitzherbert*, that a peer of the realm as well as any other person shall be committed for obstruction, and contempt in the
 nature

nature of obstruction to the process of the King's Courts. You will find moreover that the Star Chamber — I refer to the authority of the Star Chamber reluctantly, but it was a regular Court, and one little likely to err against privilege — that that Court committed a peer of the realm. The peer had disputed its authority; he was committed for an offence in the nature of a contempt, and by a process such as we should use to compel the performance of an act.

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Upon the authority, therefore, of all these cases; upon the authority, still higher in my own judgment, of the principle, and upon the reason of the whole matter, the absolute necessity of applying the laws equally to all classes, and the intolerable nuisance which would be suffered, were 1000 or 1100 persons to exist in this country placed by privilege of Parliament above the law, and enabled to defy the jurisdiction of all the King's Courts — upon all these grounds, I have no doubt whatever that the distinction here is soundly taken, — not the distinction laid down by Lord *Coke* of treason, felony, and breach of the peace on the one side and offences on the other, where no treason, felony, or breach of the peace has been committed — a distinction inconsistent with itself, fruitful of bad consequences, and incapable of being pursued through the authorities; and that the true grounds upon which to rest the case are these two: first, that privilege never extends to protect from punishment, though it may extend to protect from civil process; and, next, that privilege never extends to protect even from civil process where the object of the process is the delivery up of a person wrongfully detained by a party. All the principle, all the authorities, all the reasoning are in favour of this ground, and it is upon this, and this ground only, that
 the

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the jurisdiction of all the Courts can safely and securely rest. (a)

(a) The following case, extracted from the Registrar's book, was furnished to the Lord Chancellor by Mr. Sten.

MARTIN'S CASE.

L. C. 8th August 1747.

A person writing a letter to the Lord Chancellor, relative to a threatened suit, and inclosing a bank note, was held guilty of a contempt, and ordered to attend personally and shew cause why he should not be committed; but afterwards, on his appearing and expressing contrition, he was discharged on payment of costs.

THE Right Honourable the Lord High Chancellor of *Great Britain* this day taking notice in open Court that his Lordship, on the 2d of this instant *August*, had received a letter by the general post, directed to the Right Honourable the Chancellor of *England*, dated *Yarmouth*, in *Norfolk*, 1st *August* 1747, signed *Thomas Martin*, making mention of a bill in Chancery threatened to be filed against the said *Thomas Martin*, and relating to the subject-matter of such suit, and inclosing a bank note for 20*l.*, which he thereby desired his Lordship's acceptance of; and the said letter and bank note, and also the affidavit of *J. H.*, proving the said letter to be the proper handwriting of the said *Thomas Martin*, being read; this Court, upon

taking the said matter into consideration, deeming the contents of the said letter and the sending thereof, with such bank bill inclosed therein, unto his Lordship, to be a great misbehaviour in the said *Thomas Martin*, and a contempt of this Court, doth think fit to order that the said *Thomas Martin*, having personal notice hereof, do shew cause unto this Court, the first General *Session* after *Michaelmas* next, why he should not stand committed to the prison of the *Fleet* for the said contempt and misbehaviour, and that he do then personally attend this Court; and that the said letter and bank note of 20*l.* be deposited in the hands of the registrar, subject to the further order of this Court.

Reg. Lib. B. 1746. fol. 406.

Further Order.

L. C. 13th Nov. 1747.

THIS Court doth decree that, in consideration of the said *Thomas Martin's* sub-

mission to the Court, and asking pardon for his offence, and of his being now mayor of

of the corporation of *Great Yarmouth*, and that the commitment of him to the prison of the *Fleet* might be a prejudice to the public business and affairs of the corporation, the Court doth not think fit to order him to be committed, he consenting, by Mr. H., his clerk in Court, to pay the costs of the order made for him to shew cause why he should not stand committed, and of the execution and service

thereof, and that the bank note for 20*l.* which has been left in the hands of the registrar be applied and distributed for the relief of such of the poor prisoners in the *Fleet* prison as are the most proper objects of charity; and doth order that the said bank note be delivered by the registrar to the warden of the *Fleet* for that purpose, on the behalf of *Thomas Martin*.

Reg. Lib. B. 1747. fol. 34.

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Mr. Lons
WELLESLEY'S
Case.

COLLARD v. HARE.

Rolls.
May 6.

THE bill stated that *William Collard*, being at the time of his death seised in fee simple of certain customary messuages or tenements, holden of the manor of *Taunton Deane*, died many years ago, leaving *Elizabeth Collard*, his widow, and customary heiress according to the custom of the manor; that, upon his decease, *Elizabeth Collard* entered into possession of the said messuages or tenements, lands, and hereditaments, or into the receipt of the rents and profits thereof, as such customary heiress, and continued in such possession or receipt till the time of her death; that the lands holden of the manor of *Taunton Deane* are customary freehold of inheritance, and, by the custom of the manor, are not devisable

A testatrix devised a customary tenement to *John*, without words limiting the inheritance. Upon her death, the dormant surrenderer, in whom the legal estate was, surrendered the fee to *John*; and *John* died more than forty years before the filing of the bill, having surrendered

the tenement to a purchaser, who had notice of the will of the testatrix: Held, that the equitable title of the heir, which accrued on the death of *John*, was barred by length of time.

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devisable unless the tenant or owner makes, in his lifetime, a dormant surrender to the use of a dormant surrenderee or trustee upon the trusts of the will of the surrenderor; that, when a tenant of any lands holden of the manor dies, his customary heir, or (if he has made a dormant surrender) the dormant surrenderee is required, by the custom of the manor, within three court days after the death of the tenant, to make an entry in the court of the lord of the manor, or before his steward, the making of which entry is or amounts to an admittance, and vests the legal estate of the lands in such customary heir or in such dormant surrenderee or trustee; and in case an entry is not made within three court days, the lands become liable to be forfeited to the lord for a time, and are said to fall into lockage (which is a temporary forfeiture), and when the lands are in lockage the lord of the manor is, by the custom, bound, at any time afterwards, upon the payment of a treble fine to re-grant the same to the customary heir of the tenant who was last seised thereof, or if such tenant made a dormant surrender, then to the dormant surrenderee or trustee named therein or his customary heir: that *Elizabeth Collard* neglected to make the requisite entry after the death of her husband, whereby the said messuages or tenements fell into lockage: that *Elizabeth Collard* by her will bearing date the 20th day of *December* 1777, after reciting that she had by her dormant surrender, surrendered all her lands in the manor of *Taunton Deane* unto *George Skuse* and *George Townsend*, and to the survivor of them, and to the heirs of such survivor, subject to her last will and testament, devised as follows:—"Also I give unto my son *John Collard* all that messuage or tenement and gardens with their appurtenances situate in *East-reetch* in *Taunton St. Mary Magdalen*, late in the possession of *Madam Roberts*; and all that messuage or tenement and gardens situate in *Northtown*, in the parish of *Taunton*

Taunton St. James, with their appurtenances, late in the possession of Mr. *Thomas Burch*, both of them part of the manor of *Taunton Deane*; all the rest, money and residue of my goods, chattels, rights, and credits whatsoever and wheresoever, I give and bequeath unto my said son *John Collard*:" that *Elizabeth Collard* died shortly afterwards, leaving *William Collard* her youngest son and customary heir, and also the customary heir of her late husband *William Collard*, according to the custom of the manor; that, on or about the 11th day of *October* 1779, the lord of the manor granted the customary premises comprised in *Elizabeth Collard's* will, out of lockage, to the said *George Townsend*, his heirs, and assigns for ever, as the surviving surrenderee named in the dormant surrender made by the said *Elizabeth Collard*; that *George Townsend* was thereupon admitted and became seised of the legal estate of and in the said premises, upon the trusts of the will: that, under these trusts, *John Collard* became entitled in equity to the premises for the term of his life, and subject to such life estate, *William Collard*, the youngest son and customary heir, became entitled in equity to the same: that, on the 12th of *October* 1779, *George Townsend* surrendered the premises into the hands of the lord of the manor, to the use of *John Collard*, his heirs and assigns for ever, according to the custom of the manor, and he was accordingly admitted: that, in the year 1782, *John Collard* surrendered the same premises to the use of *Hugh Payne* and *Betty Collard*, their heirs and assigns: that they were admitted thereto, and, in the year 1785, surrendered the same premises to the use of *George Hare*, his heirs and assigns: that *George Hare* was admitted, and, upon his death, the Defendant *Thomas Hare*, being his customary heir, was admitted tenant, and had ever since been in the receipt of the rents and profits of the lands; that the Plaintiff was the customary heir both of his grandfather *William Collard*, and of his father *William*

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Collard, and of his mother *Mary Collard*, and of his grandmother, the testatrix *Elizabeth Collard*: that *John Collard* died several years ago, and, upon his death, *William Collard* the Plaintiff's father, if then living, and if not, *Mary Collard*, and upon her decease, the Plaintiff, as such customary heir, became entitled to the customary premises in question.

The bill, after stating that the Defendant alleged that *Hugh Payne*, *Betty Collard*, and *George Hare* purchased the premises for full valuable consideration and without notice of the Plaintiff's title, charged that the several persons, under whom the Defendant claimed the premises, had notice, before or at the times when the same were surrendered or assured to them, "of the matters aforesaid, and particularly of the will of *Elizabeth Collard*, and of the premises having belonged to her and being held under her will;" and it further charged that "the legal estate in the premises became vested in *George Townsend* as a trustee upon the before-mentioned trusts, and that *John Collard*, *Hugh Payne*, *Betty Collard*, *George Hare*, and the Defendant *Thomas Hare*, respectively, became seised of the legal estate in the premises under and by virtue of the surrender made by *George Townsend*; and that they held, and the Defendant continued to hold the legal estate upon and subject to the same trusts upon which *George Townsend* held the same, and that the Defendant was a trustee for the Plaintiff." The prayer was, that the Defendant might be declared a trustee of the premises for the Plaintiff and decreed to surrender them to him.

The answer stated that "dormant surrenderees are not considered to be and are not in fact trustees, but that dormant surrenderees, when the surrenderor dies intestate, take, both at law and in equity, according to the custom of the said manor, the absolute beneficial ownership, estate,

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estate, right, and title in fee, according to the custom of the said manor, of and in the premises surrendered, or such parts thereof and such estates therein, of which the surrenderor dies intestate, without any trust for the customary heir of the surrenderor." On this ground the Defendant insisted, that, even if the will of *Elizabeth Collard* gave her son *John* only a life estate in the premises, the inheritance of the equitable estate did not descend to the customary heir, but belonged to *Townsend*, and passed from him, by his surrender, to those in whose favour that surrender was made. The Defendant also stated, that, "*Hugh Payne* and *Betty Collard* having become entitled adversely as against the Plaintiff and those under whom he claimed, and having good right to convey and surrender such premises, for a valuable consideration they, on or about the 19th of *May* 1785, did surrender the said premises to the use of *George Hare*, his heirs and assigns;" and he insisted "that he had obtained good title against the claim of the Plaintiff to the said premises by the adverse possession of himself and his predecessors in estate, for a period of forty years and upwards, without notice of the Plaintiff's claim." He said further, "that he did not know and could not set forth, as to his remembrance, information, or belief, whether the several parties, under whom he claimed title to the premises, or any or either of them, before or at the times when the same were surrendered, or assured to them respectively, were or were not, was or was not aware, or had or had not notice of the matters in the bill alleged, or any or either of them, or of the will of *Elizabeth Collard*, or of the premises having belonged to *Elizabeth Collard*, and being held under such will." *John Collard*, he said, was dead many years ago; but he did not know when he died.

The Plaintiff proved his title as alleged in the bill; and the documents showed that those, under whom the

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Defendant claimed, had notice of the will of *Elizabeth Collard*. The Defendant proved that *John Collard* died about fifty years ago.

Mr. *Bickersteth* and Mr. *Jacob*, for the Plaintiff.

As the devise to *John Collard* in the will of *Elizabeth* does not contain any words of limitation, he took only an equitable estate for his own life; subject to which estate the equitable fee descended to the customary heir, and was transmitted to the Plaintiff by the death of his father and mother. *Townsend* had the legal fee; and being a trustee of it for *John* during his life, with remainder to those through whom the Plaintiff claims, he made a surrender to *John Collard* in fee. It was the duty of *Townsend* to take care of the interests of all the *cestuis que trust*; and, the surrender by him being made without consideration, and to a party who had no claim except under *Elizabeth's* will, *John* necessarily took the legal fee clothed with the same trusts on which *Townsend* had held it. *Hugh Payne*, *Betty Collard*, and *George Hare* had notice of *Elizabeth's* will; and they must be held, therefore, to have been successively trustees, and the Defendant must be held to be now a trustee, for the party rightfully entitled. The doctrine of *Cholmondeley v. Clinton* (a) does not apply; for there the legal estate was outstanding; and the party, who had acquired the alleged adverse possession, and sought to protect himself by it, had not gotten it by any breach of trust, and had not been placed at any time in the situation of a trustee. In *Cholmondeley v. Clinton* (a), Lord *Eldon* observes, "In the case of a strict trustee, it was his duty to take care of the interest of his *cestui que trust*, and he was not permitted to do any thing adverse to it; a tenant also had a duty to preserve the interests of his landlord; and many acts therefore of a trustee and a tenant, which,

(a) 2 Jac. & Walk. 190.

which, if done by a stranger would be acts of adverse possession, would not be so in them, from its being their duty to abstain from them." The Plaintiff has therefore a clear title; and length of time is not in this case any bar to the relief he prays.

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COLLARD
v.
HARE.

Besides, a defendant in order to protect himself by length of time as a bar, must by his answer insist on the benefit of it by clear and unequivocal words. As the statute of limitations must be insisted on in due form, either by plea or answer, so this defence, which is admitted in equity only by analogy to the statute, must be raised in due form. Here the answer insists, not that the Defendant is protected by length of time, but that he has obtained good title by adverse possession for more than forty years, without notice of the Plaintiff's title; and so little did he deem length of time a defence, that he says he does not know when *John Collard* died, though it was only from the time of *John Collard's* death, that adverse possession could run.

Mr. Pemberton, contra.

Any title, which the Plaintiff may have, accrued in possession on the death of *John Collard*, which took place more than forty years ago; and the question is, can he now have the assistance of this Court to give effect to his alleged equitable right. If the legal estate had continued outstanding in *Townsend* or any other person, it is admitted that the rule established in *Cholmondeley v. Clinton* would apply; and is a party to be in a worse situation, because he has clothed his adverse possession with the legal title? The parties, who purchased from *John Collard*, believed that he was the owner of the estate; and under that belief they took a conveyance from him. If they can be affected with notice of an equitable title in the Plaintiff, that does not render them trustees for him; it only gives an adverse equitable right, and he is

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 COLLARD
 v.
 HARE.

bound to enforce that right within twenty-one years. The objection of length of time is sufficiently raised in the answer; and even if it were not, the Defendant has a right to the benefit of it, if the facts disclosed in evidence bring the case within the rule.

The MASTER of the ROLLS.

Elizabeth Collard being seised of certain customary freeholds, parcel of the manor of *Taunton Deane*, made a dormant surrender thereof, according to the custom of the manor, to two trustees and their heirs, subject to her will and testament; and afterwards by her will she made a devise in favour of her son *John Collard* in terms, which, it was contended, gave him only an estate for life. After the death of *Elizabeth Collard*, the surviving trustee in the dormant surrender, considering that *John Collard* took a fee under his mother's will, on the 12th of *October* 1779 surrendered the customary tenements to the use of *John Collard*, his heirs and assigns.

On the 7th of *September* 1782, *John Collard* sold the customary tenements to *Hugh Payne* and *Betty Collard*, and surrendered the same to them and their heirs; and the Defendant in the suit was in possession under a subsequent sale made by those purchasers to an ancestor of the Defendant in the suit. The Plaintiff claimed as equitable owner under *Elizabeth Collard's* will, upon the ground that *John Collard* took only a life estate under that will, and prayed a surrender of the legal estate from the Defendant. The time of the death of *John Collard* was not distinctly in evidence, but it was admitted that he had been dead upwards of forty years before the filing of the bill.

The Defendant relying upon the objection arising from the length of time, did not argue the question whether, upon the true construction of *Elizabeth Collard's* will, *John Collard* did take an estate for life or in fee.

The

The Plaintiff insisted that *John Collard* was tenant for life only; and that in respect of the fee which he took under the surrender of the surviving trustee of the will, inasmuch as he was affected with notice of the will, he was a trustee for the uses of the will; that the Defendant claiming under that surrender was also affected with notice, and equally a trustee for the uses of the will; and that a trustee could not avail himself of length of time against his *cestui que trust*.

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COLLARD.
v.
HARE.

From the death of *John Collard*, which is admitted to have taken place upwards of forty years before the filing of the bill, the possession was plainly adverse to the title of the Defendant; and the House of Lords has decided that this Court will not relieve after an adverse possession of twenty years. The Defendant may be considered as affected with notice of *Elizabeth Collard's* will; and if the Plaintiff had claimed within the twenty years, there would have been an equity against the Defendant, which is now barred by length of time. But the relation of trustee and *cestui que trust* does not exist between these parties in the sense in which Lord *Eldon* has used the expression.

Bill dismissed with costs.

In the Matter of PIGOTT.

July 30.

THE Lord Chancellor stated, in relation to this and several other petitions which had been presented under the act 1 W. 4. c. 60., for enabling persons of unsound mind, but not found lunatic by inquisition, to convey property vested in them by way of trust or mortgage, that the reference under that act ought in future to comprize the following points:—

Proper form of the reference under the 1 W. 4. c. 60.

First,

1881.
 In the Matter
 of
 PIGOTT.

First, An inquiry whether the alleged trustee or mortgagee was an idiot, lunatic, or of unsound mind, or incapable of managing his affairs ; and if so,

Secondly, Whether he was seised or possessed of the estate or hereditaments and premises in the petition mentioned, or of any and what parts thereof, either alone or jointly with any other and what persons, as a trustee or trustees, upon any and what trusts, or by way of any and what mortgage and for whom, within the meaning of the act ;

Thirdly, Whether the alleged lunatic trustee or mortgagee took any and what beneficial interest therein ;

Fourthly, Whether there was any and what power or authority under the deed or instrument by virtue of which the alleged lunatic became a trustee or mortgagee, to appoint a new trustee or trustees ; and if not, then

Fifthly, A direction to inquire and certify who was a proper person or persons to be appointed such new trustee or trustees in the room of — ; and also

Sixthly, To appoint a proper person to convey to such new trustee or trustees.

Aug. 9.

COCHRANE v. COCHRANE.

Biddings
 opened on an
 advance of
 500*l.* upon
 13,500*l.*,
 under the cir-
 cumstances.

MR. *KOE*, on behalf of a purchaser, moved to discharge an order of the Vice Chancellor permitting biddings to be opened. The estate had been sold for 13,500*l.* upon which an advance of 500*l.* was offered by

by a person who was present at the sale. The order, it was contended by Mr. *Koe*, went further than any precedent warranted. The proposed advance was less than four per cent. upon the purchase-money; and as this was a common administration suit, and not a contest among creditors seeking payment out of a deficient fund, the Court ought not to go beyond the ordinary rule, and, for the supposed benefit of individuals, parties in the cause, extend a practice which was prejudicial to suitors generally, and which Lord *Eldon* had frequently censured and regretted.

1831.

 COCHRANE
 v.
 COCHRANE.

Mr. *Kindersley* opposed the motion, and cited *Lefroy v. Lefroy* (a) as an authority for his Honor's order. In such cases the Court had regard principally to the interests of the parties who would be entitled to the proceeds of the sale; and here all those parties were desirous that the biddings should be opened.

The LORD CHANCELLOR, after looking at the affidavits and the particulars of sale, observed that the purchase appeared to him to be a very advantageous one. Besides the value of the timber, the lands yielded a clear rental of more than 400*l.* a year, paid by substantial tenants; and the leases were granted at a period when the lands were not likely to be let too high. It was not improbable that the estate might bring considerably more upon a re-sale than had yet been offered. He should therefore affirm the order, but without costs, as this was said to be the first instance of biddings being opened on an advance of less than four per cent. (b)

(a) 2 *Russ.* 606.

(b) *Lawrence v. Halliday*, 6 *Sim.* 296.

1891.

March 22.

DELL v. BARLOW.

The deposit on an appeal is merely a security for costs; and, therefore, where an appeal is dismissed without costs, the deposit will be returned, unless the Court makes special order to the contrary.

AN order was made in this cause dismissing the appeal without costs, but nothing was said in the order respecting the deposit.

Mr. *Koe* now applied on behalf of the appellant, to have the deposit returned. The deposit, he submitted, was merely intended as a security for the costs, in case they should be given against the party who appealed.

Mr. *Combe, contra*, relied on the forty-second of the new orders, by which it is provided "that the deposit upon every petition of appeal or re-hearing, be increased to 20*l.*, to be paid to the adverse party when the decree or order appealed from is not varied in any material point, together with the further taxed costs occasioned by the appeal or re-hearing, unless the Court shall otherwise order." The subject had been before the Chancery Commissioners; and they had introduced into their report a recommendation which it seemed to be the object of the forty-second order to carry into effect. Mr. *Combe* also referred to the order of Lord *Loughborough*, and the construction which it had uniformly received in practice.

The LORD CHANCELLOR said he considered the deposit to be in the nature of a security for costs; and that for the purpose of putting a sensible construction on the forty-second order, he must read the words "unless the Court shall otherwise order" as governing all the preceding clauses of the sentence, and applicable to the deposit as well as to the costs. To adopt the
other

other construction, would in truth be to impose a penalty of 20*l.* upon an appeal. Consistently with his judgment in this case that no costs were to be given to either party, he should, therefore, as a matter of course direct the deposit to be returned.

1831.
DELL
v.
BARLOW.

His Lordship acted on the same principle in *Portman v. Mill*, 18th March 1831, and in several other cases, in which he affirmed the decree of the Court below without costs.

HOOD v. WILSON.

July 15.

THIS was the bill of a creditor, suing on behalf of himself and other creditors, and praying the administration of the assets of a deceased debtor. The fund had proved insufficient to satisfy all the debts.

Costs, as between solicitor and client, will be allowed to the Plaintiff in a creditors' suit, where there is a deficient fund.

Sir *E. Sugden* asked for the costs of the Plaintiff, as between solicitor and client. He stated that where a bill was filed for the general benefit of creditors or legatees, and the estate proved deficient, the Court had been of late years in the habit of giving the plaintiff his costs of the suit as between solicitor and client. This rule had been adopted by Lord *Lyndhurst* in *Turner v. Turner*; and it had also been recently sanctioned by the present Master of the Rolls (*a*), and the Vice-Chancellor. (*b*)

Mr.

(*a*) *Chisum v. Dewes*, 5 *Russ.* 29. *Rowlands v. Tucker*, vol. i. p. 635. *suprà*.
(*b*) *Tootal v. Spicer*, 4 *Sim.* 510.

1831.
 Hood
 v.
 Wilson.

Mr. *Agar*, *contra*, denied that any such general practice had been established, whatever might have been done in particular cases. Lord *Eldon*, though repeatedly applied to for that purpose, had uniformly refused to lay down such a rule.

The LORD CHANCELLOR said he saw no reason why he should depart from what appeared to be the rule adopted in the other branches of the Court, and he therefore gave the Plaintiff his full costs. (*a*)

(*a*) The rule appears to be now well established, provided there is a deficient fund. See, in addition to the cases referred to, *Larkins v. Parton*, 2 *Mylne & Keen*, 320. *Brodie v. Bolton*, 5 *Mylne & Keen*, 168.

July 21.

OGLE v. BRANDLING.

The consent of both parties is not necessary to a private hearing.

MR. *JACOB* stated that this case related to the custody of a young lady who was a ward of the Court, and that some of the disclosures made in the affidavits were of so distressing a kind as to render it in his opinion a proper case to be heard in private.

Mr. *Ellison* and Mr. *Mathews* said that, on behalf of their client, they could not consent to a private hearing: there was nothing which in their judgment made such a course necessary, and they were anxious to have the matter heard and disposed of at once.

The LORD CHANCELLOR said he would direct the case to be heard in private, notwithstanding that one of the

the parties withheld his consent; he would act on that as on other similar occasions upon the responsibility of the counsel, who gave him the assurance that a private hearing was proper.

1831.

 OGLE
 v.
 BRANDLING.

The case was accordingly heard in the private room.

The LORD CHANCELLOR subsequently followed the same course in several other instances. (a)

(a) See *In the Matter of Lord Portsmouth*, Coop. 106.

BOYS v. WILLIAMS.

July 30.

THE will of *Elizabeth Shields* bearing date the 9th of December 1817, after devising her freehold messuages and premises to divers persons therein named, proceeded as follows: — “I give unto the nephews and nieces of my late husband 300*l.* stock, 5*l.* per cent. navy annuities, to be divided among them in equal shares and proportions. I also give to my cousins *Elizabeth Brown*, *Charlotte Richardson*, and *Thomas Richards*, 200*l.* stock, each, 5*l.* per cent. navy annuities. I also give to my relations *Jonathan King* and *Sarah* his wife, 200*l.* stock 5*l.* per cent. navy annuities; and to my relations *David Shore* and his brother *Samuel* 100*l.* each of the like stock.” The will then gave legacies of sums of 4*l.* per cent. stock to various individuals and charities, to the amount in all of 1300*l.* of that stock.

A testatrix by a codicil gave to *A.* and *M.* “50*l.* each of Bank long annuities, now standing in my name.” At the date of the codicil and at her death, she possessed long annuities sufficient to answer this bequest specifically, but not also to satisfy certain legacies charged by the other testamentary papers upon

The same stock. Evidence as to the state and value of the testatrix’s property in the funds at those respective times was admitted; and on the effect of that evidence, and the language of the testamentary papers, taken together, the bequests to *A.* and *M.* were held not to be specific, but pecuniary.

1831.
 Boys
 v.
 WILLIAMS.


The testatrix subsequently made a codicil dated the 6th of *April* 1818, which contained the following passage:—“Whereas I have, since the executing of my last will and testament, exchanged my 5*l.* per cent. navy, and 4*l.* per cent. Bank of *England* stocks, into the Bank of *England* long annuities stock; I do by these presents declare my will to be that all legacies in my will shall be paid out of my present stock, that is to say, the legacies in the five per cents. navy, and four per cents. shall be paid by the same amount in the long annuities, 5*l.* per annum for 100*l.* five cents., and 4*l.* per annum for 100*l.* four per cents., and in the same proportion for less sums.”

Another codicil, of the 8th of *May* 1821, (in the pleadings called the third codicil) made some alterations in the disposition of the real property devised by the will, and concluded in these words;—“I likewise give unto *Amelia Shields Boys* and *Mary Boys*, daughters of *Thomas* and *Mary Boys*, 50*l.*, each, of Bank long annuities stock, now standing in my name.”

A memorandum, dated the 27th of *July* 1827, and also proved as a testamentary paper contained the following passage;—“The estate left to *Charlotte Richardson* to go to *Samuel Shore*, baker, of *Turnham Green*, and 100*l.* Bank five per cent. annuities; to the children of the late *Thomas Richards* of *Isleworth*, 10*l.* per annum out of the same stock, to be divided share and share alike; to my servant *Elizabeth Chandler* the sum of 5*l.* a year for her natural life, out of the same stock. The testatrix died on the 8th of *September* 1828.

The question in the cause was, whether the bequests to the Plaintiffs, *Amelia S. Boys* and *Mary Boys* were
 specific

specific legacies of 50*l.* of the testatrix's stock in the long annuities, or legacies of 50*l.* sterling charged upon that stock.


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 Boys
v.
 WILLIAMS.

At the hearing of the cause before the Vice-Chancellor the depositions of *Peter Fenn*, a clerk in the Bank of *England*, and also of a broker, who spoke to the nature, amount, and market value of the stock standing in the bank in the testatrix's name, at the several times of the execution of her will and third codicil, and of her death, were tendered in evidence, to shew that the legacies in question to *Amelia S. Boys* and *Mary Boys* were not specific but pecuniary.

His Honor rejected these depositions as inadmissible, and decided that the legacies were gifts of so much stock in the long annuities (*a*); and the Defendants thereupon appealed.

Sir *E. Sugden* and Mr. *Richards*, for the appeal, said it would be convenient in the first place to have the question determined, whether his Honor was right in rejecting the depositions. They submitted that inasmuch as the evidence was offered only to aid the construction of words which were in themselves equivocal, and not to control or do violence to the meaning of the will, it ought to have been admitted. "Bank long annuities stock" was not a correct designation of any existing species of government stock. The Court in forming its judgment, had a right to whatever assistance could be derived from being placed, as it were, in the chair of the testatrix, and knowing with respect to the state of her property, all the facts which she must have known

(*a*) 3 *Sim.* 563. where the testamentary papers and the pur- port of the depositions are very fully stated.

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 v.
 WILLIAMS.

known and had present to her mind at the time when she sat down to dispose of it; *Fonnereau v. Poyntz* (a), *Selwood v. Mildmay* (b), *Colpoys v. Colpoys* (c), *Lowe v. Lord Huntingtower*. (d) In *The Attorney-General v. Grote* (e) a case very similar to this, where the evidence had been rejected, Lord *Eldon* on appeal afterwards admitted it; and upon the effect of that evidence he reversed the decision of Sir *W. Grant*, and cut down legacies, which had been held upon the words to be legacies of so much stock, to mere money legacies. (g)

Mr. *Pepys* and Mr. *Kindersley*, *contra*, contended that there was no ambiguity apparent on the face of the will; and it was only the introduction of evidence, as to the state of the testatrix's property that could create the smallest doubt or uncertainty on the subject. The bequest was of "50*l.*, each, of Bank long annuities stock now standing in my name." The expression "Bank long annuities stock" might not be technically accurate, but the meaning was not the less certain. Nothing indeed could be more clear or specific; and it was impossible to hold that evidence, shewing that the testatrix probably intended something different from what she had in so many words said, namely, to give 50*l.* of the Bank long annuities there described, was not tendered for the purpose of controlling and doing violence to the plain import of the words. For the purpose of aiding construction, the Court had no right to look at extrinsic evidence as to the state of the property at all; *Roper on Legacies*. (h) The decision of Lord *Thurlow* in *Fonnereau v. Poyntz* had been

(a) 1 *Bro. C. C.* 472.

(b) 3 *Ves.* 306.

(c) *Jac.* 451.

(d) 4 *Russ.* 532. n.

(e) 3 *Mer.* 316.

(g) See a note of Lord *Eldon's* judgment, p. 699. *infra*.

(h) Vol. i. p. 270.

been frequently disapproved of; but even if its authority were undisputed, it was a case of very peculiar circumstances, the language being equivocal and hardly intelligible, unless reference was had to the explanation afforded by the evidence. Besides, in that case, as well as in *Selwood v. Mildmay*, a latent ambiguity was caused by the fact, that upon the words as they stood, there was no fund in existence to answer the legacies. That was not so, however, in the present instance; for the testatrix when she made her will, and also on the day of her death, had an amount of long annuities, standing in her name, more than sufficient to satisfy the specific legacies in question. In *Colpoys v. Colpoys* and in the *Attorney-General v. Grote*, inaccurate and equivocal expressions were used, which could only be explained and reconciled by referring to matter *dehors* the will.

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Boys
v.
Williams.

The LORD CHANCELLOR said that upon the question of the admissibility of the evidence, he should not trouble counsel to reply, as he entertained no doubt whatever that there had been a miscarriage in that part of the Vice-Chancellor's judgment. To the proposition, that because the words of the will were clear upon the face of them, extrinsic evidence was inadmissible, it was wholly impossible to accede; that being the case of a latent ambiguity, the very case which, according to all the text writers, formed the exception to the general rule against admitting *parol* evidence to explain or construe the words of the instrument. It was because the ambiguity was not patent, but latent, that is to say discoverable only upon reference to the subject-matter upon which the will purported to operate, that the Court was justified in resorting to extrinsic evidence at all. It was perfectly true that the Court was not at liberty

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 WILLIAMS.

in the case of any written instrument, will of real or personal estate, or a deed into the consideration of the question any matter furnished by extrinsic purpose of giving a different meaning from that which their plain import. The Court was not at liberty by rule the construction, which appeared on the face of the instrument position was perfectly consistent of evidence to explain, the language, to aid though the construction.

His Lordship then authorities which present was, in testimony might principles laid especially in *Fletcher* that where

brought the cumstar its present removal

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on

and

charge on any other stock she might be charged with the proceeds? In all the cases in evidence as to the state and value of the property then admitted, the bequest was general, of so much of a particular stock belonging to the testator, and not, as here, of so much of a particular stock described as then standing in his name; and in all of them, moreover,

(a) 4 Ves. 568.

(b) 4 Ves. 748.

(c) 2 Mad. 268.

Jersey (a) in the House of Lords. The decision of Sir *W. Grant* in *The Attorney-General v. Grote* might perhaps have created some doubt with respect to the principle; but that decision had been reversed by Lord *Eldon*, and could no longer be considered as an authority. Upon these grounds he was clearly of opinion that the evidence tendered must be admitted.

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Boys
v.
WILLIAMS.

The depositions were then read, from which it appeared that on the 9th of *December* 1817, when the testatrix made her will, she possessed 1560*l.* navy five per cents. and 1400*l.* four per cents. standing in her name, and no other sum of Bank annuities or government stock: that on the 8th *May* 1821, the date of the third codicil, she possessed the sum of 154*l.* per annum long annuities standing in her name, being of the value of 2887*l.* 10*s.* at the market price of the day, but no other sum of Bank annuities or government stock: and that on the 8th of *September* 1828, the day of her death, she possessed the sum of 176*l.* per annum long annuities standing in her name, being of the value of 3542*l.*, at the market price of the day, and no other sum of Bank annuities or government stock.

Sir *E. Sugden* and Mr. *Richards* then submitted, that upon the whole context of these testamentary papers, especially when considered in connection with the state of the testatrix's funded property, as it was now disclosed to the Court by the depositions, the testatrix must have necessarily meant to give to the Misses *Boys* a sum of 50*l.* sterling each, out of her long annuities, that being the only stock of any description which she then possessed, to answer all the numerous legacies which, by the

(a) 2 *Brod. & Bing.* 551.

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the codicil of the 6th of *April* 1818, were expressly charged upon that stock. Upon any other construction the codicil of the 8th of *May* 1821 would operate as an almost total revocation of the will.

Mr. *Pepys* and Mr. *Kindersley*, on the other side, contended that the evidence as to the state and value of the testatrix's funded property did not carry the appellants' case further than the words of the will and codicil had done. That was the opinion expressed by his Honor in the Court below. If the legacies to the Misses *Boys* were specific (and that they were so upon the terms of the gift it was impossible to deny) all that remained for the Court to do was to inquire whether, at the time of the testatrix's death, she possessed a fund to answer them specifically; and to that extent, and for that purpose only was the parol evidence now to be received; *Innes v. Johnson* (a). The amount or value of the fund at other times, or with reference to other claims which might possibly be made on it, especially if those claims were merely pecuniary, was immaterial; the Court in putting its construction upon the language of bequests which were in form specific, having no right to enter into such considerations; *Kirby v. Potter* (b), *Norris v. Harrison* (c). Would it be maintained that if the testatrix had subsequently to the date of her third codicil sold all her long annuities, these two legacies would have been good as a charge on any other stock she might have purchased with the proceeds? In all the cases in which evidence as to the state and value of the property had been admitted, the bequest was general, of so much of a particular stock belonging to the testator, and not, as here, of so much of a particular stock described as then standing in his name; and in all of them, moreover,

(a) 4 *Ves.* 568.

(b) 4 *Ves.* 748.

(c) 2 *Mad.* 268.

moreover, there had been so much variation and incorrectness in the language in which the different legacies alleged to be specific were given, that upon the face of the will itself, a reasonable doubt as to the meaning was raised.

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Boys
v.
WILLIAMS.

The LORD CHANCELLOR.

The Court is now called upon to put a construction upon these testamentary papers, with the aid of all the light to be gained from the knowledge which the testatrix was herself possessed of with respect to her funded property, and which must be presumed to have influenced and guided her at the time when she proceeded to dispose of it. It is vain to say that the evidence shall be let in for one purpose, namely, to shew that these legacies must be specific because there is a fund to answer them, and that it shall not also be received for the purpose of shewing the amount and value of the fund, with a view to the decision of that same question. The cases of *Selwood v. Mildmay*, and *Fonnereau v. Poyntz* point at no such distinction or restriction; and no such restriction has been suggested by Lord Eldon in *The Attorney-General v. Grote*.^(a) If the evidence as to the state and value of the property is to be admitted for one purpose, it must be admitted for all; the principle being, that in order the better to come to a correct conclusion on the whole of the testamentary dispositions, the Court has a right to the assistance to be derived from being placed as much as possible in the position of the testator, so as to see with his eyes and understand his feelings at the time when he exercised his disposing power; and having now the benefit of that assistance I am clearly of opinion that these must be considered as mere pecuniary legacies, intended to be charged upon the stock in question.

It

(a) p. 699. *infra*.

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It was said with truth that when the legacies are specific, it is a matter of no importance to ascertain what was the value of the fund either at the time of the testator's death or at the date of the will; for all that would result from a deficiency of the fund would be that some parties would go unpaid. But the very question here is, whether the legacies are specific or not; and in determining that question, the Court is clearly called upon to look at the state and amount of the testatrix's property with reference to the provisions contained in the whole of the testamentary papers, and will not lightly assume that she has given legacies without any intention that they should enure for the benefit of the legatees. The Court always leans, where without violence to the words, and in fairness, it can do so, towards such a construction as will make the whole will effectual, rather than to a construction which would render one half or two thirds of its provisions utterly inoperative.

Now I desire to know in what respects this case differs from the others in which evidence of the state and value of the property has been received in aid of the construction? It is said that here the probability that these legacies were intended to be pecuniary is not so great as it was in those cases; and it is further said, that the words designating the subject-matter of the gift are stronger and more specific than in them; but I confess I see no substantial distinction between "—l. in long annuities to be transferred by my executors to the legatees," the expression used in *Fonnereau v. Poyntz*, and "50l. each Bank long annuities stock now standing in my name," the expression with which I have here to deal. In both cases equally the testatrix appears to me to be plainly dealing with her own fund, and that a fund which she conceived she then had in her possession. The same observation appears to have occurred to Lord

Eldon

Eldon in *The Attorney-General v. Grote* with respect to the expression “further part of my stock,” as indicating an impression on the mind of the testatrix that she was dealing with stock which she then actually had. That expression appears to me to be quite as strong in favour of holding the legacy there given to be specific, as any words which are to be found in this will. Nevertheless Lord *Eldon*, upon the effect of that expression, considered in connection with the rest of the will, and as elucidated by the evidence with respect to the state and value of the property, determined that the legacies of so much of the testatrix’s long annuities stock were to be construed as mere money legacies charged upon that stock.

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Boys
v.
WILLIAMS.

Any intimation which his Honor may have thrown out, as to what his opinion might have been if the evidence were admitted, must have been entirely extra-judicial.

Judgment reversed.

Reg. Lib. A. 1830. fol. 2956.

ATTORNEY-GENERAL v. GROTE. (a)

1827.

THIS case (b) was argued on appeal before Lord *Eldon*, who had not pronounced judgment at the time when he resigned the Great Seal; but the following written opinion was afterwards delivered out by his Lordship, the parties having consented to accept it as his judgment: —

Legacy of
“100l. Long
Annuities
stock” held,
upon the con-
text of the
will and the
terms of the
gift as com-
pared with
those of the
other be-
quests, and
pecuniary and not


“ I have

(a) See the preceding case.

(b) Reported in 3 *Mer.* 316.

upon the evidence of the state of the funded property, to be pe-
specific.

1827.


 ATTORNEY-
GENERAL
v.
GROTE.

“ I have very frequently given my attention to this case, and I have no hesitation in stating that I have often changed my opinion upon it. To say that I have never been able, to my own satisfaction, to reconcile the decisions to be found in the books upon cases which involve similar questions, is only to repeat what I have often stated in Court. The difficulties in this case are *probably* considerably increased by the Judge's being obliged to take the will and codicil as they are to be found in the probate, although it is very possible that their contents, when the testatrix made them, might influence the construction of such parts as must now be taken to be the whole of the will and codicil.


“ I think there is evidence upon the face of the will that the testatrix meant the legacies which she connects with the word ‘stock’ to be legacies of stock which she had. She uses the expression ‘further parts of *my* stock;’ and where the testatrix uses the expression ‘*my* stock,’ I conceive she means to give what she has.

“ The question is whether, where she gives 100*l.* long annuities stock, she means the same as if she had given 100*l.* per annum long annuities. It is difficult to get rid of a strong impression which the repeated variations of the terms ‘gifts of —*l.* per annum bank long annuities,’ and of the terms ‘100*l.* long annuities stock,’ to be found in this will, create in the mind of a person reading the will. It is difficult to conceive that the testatrix really meant the same thing in both cases. But individual belief ought not to govern the case; it must be judicial persuasion.

“ Parol evidence, if there were any, of what the testatrix meant, will not do. In *Stafford v. Horton (a)*, as I understand,

(a) 1 Bro. C. C. 482.

understand it, parol evidence, or what could only have been proved by parol declarations, was held not to be admissible to control the words of the will. After frequently changing my opinion upon the present case, as I apprehend evidence of the state of the funded property of the testatrix may be resorted to, I have come to the conclusion that there is enough in the terms of the gift and the state of the property, taken together, to authorise a Court in saying, that the 100%. were not to be 100%. per annum, but so much stock as would be sufficient to pay 100%. Those terms and that state, taken together, seem to me to authorise this construction of the legacies, as reasonably as any words in *Fonnereau v. Poyntz* authorised a limited construction of sums in long annuities in that case.

1827.

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 GENERAL
 P.
 GROTE.

“This is the opinion I have finally formed after giving repeated attention to every part of the gifts in, and contents of the will and codicil, and to all the reasoning I have met with in reports. That this is a very doubtful case, and that therefore no opinion of mine upon it, or, as I think, of any body, can be justly represented as unquestionably right, I admit; but such as my opinion is, I have stated it. If it is acted upon, the legacy in question is 100%. and not 100%. per annum.”

“His Lordship doth order that such part of the decree made on hearing this cause on the 22d day of *July* 1817, as declares that the several legacies of long annuities and long annuity stock mean so much in the long annuities, be reversed; and doth declare that the said several legacies of long annuities and annuity stock mean so much in money, to be raised by sale of a sufficient part of the said testatrix's bank long annuities. And it is ordered

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 {
 ATTORNEY-
 GENERAL
 v.
 GROTE.

ordered that the said decree be also varied by directing that the costs of the relator, thereby directed to be taxed, be taxed, as between solicitor and client, and in all other respects it is ordered that the said decree be affirmed."

1831.
 Dec. 5. 10.

DEERHURST v. The Duke of ST. ALBAN'S.

A second rehearing, after the cause has been heard and decided in the court below, and once reheard on appeal by the Lord Chancellor, is not a matter of right, but an indulgence which the Court will only grant on a special case made.

THIS was a petition of appeal from a decision of Lord *Lyndhurst*. The case had been originally heard and decided by Sir *John Leach* when Vice-Chancellor. (a) It was afterwards heard on appeal by Lord *Eldon*, who resigned the Great Seal before delivering judgment; and it was heard a second time on appeal in December 1829, by Lord *Lyndhurst*, who, on the day he quitted office, handed his written judgment to the registrar, simply affirming his Honor's decree. A petition was now presented, and came on for argument, praying that Lord *Lyndhurst's* decision might be reheard.

Sir *E. Sugden*, for the Respondents, took a preliminary objection, that the Appellants had no right to a second rehearing. They might have two hearings in the Court below, and were then entitled to one rehearing in the Court of Appeal; but they could not have the cause twice heard in that Court.

The LORD CHANCELLOR, considering that it involved an important question of practice, directed the petition to stand over, that he might have the benefit of the assistance of the learned Judges in the other branches
 of

(a) 5 *Mad.* 232.

of the Court, and that the Appellants' counsel might be prepared to argue the point.

The preliminary objection was this day very fully argued before Lord Chancellor *Brougham*, assisted by the Master of the Rolls and the Vice-Chancellor.

Sir *E. Sugden* and Mr. *C. Romilly*, in support of the objection.

Mr. *Pepys*, Mr. *Preston*, and Mr. *Hodgson*, *contra*.

The case was argued on both sides upon the naked question of right, without reference to any special circumstances which might be supposed to arise from the nature of the proceedings, or the manner in which the judgment appealed from was delivered. It was admitted on the part of the Respondents, that the objection did not apply to motions or to petitions in bankruptcy. The following authorities were referred to;—*Brown v. Higgs* (a), *Nott v. Hill* (b), *Porter v. Hubert* (c), *Eyton v. Eyton* (d), *Falkland v. Cheney* (e), *Bovey v. Smith* (g), *Noel v. Robinson* (h), *Howel v. Howel* (i), *Parker v. Dee* (k), *Fox v. Macreth* (l), *East India Company v. Boddam* (m), *Williams v. Goodchild* (n), *Giffard v. Hort* (o), *Waldo v. Caley* (p), *Buck v. Fawcett* (q), *Blackburn v. Jepson*. (r)

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| (a) 8 <i>Ves.</i> 561. | the older cases are stated and |
| (b) 1 <i>Vern.</i> 167. | commented upon. |
| (c) 2 <i>Ch. Rep.</i> 85. | (m) 13 <i>Ves.</i> 421. |
| (d) 4 <i>Bro. P. C.</i> 149. <i>Toml.</i> ed. | (n) 2 <i>Russ.</i> 91. |
| (e) 5 <i>Bro. P. C.</i> 476. <i>Toml.</i> ed. | (o) 1 <i>Scho. & Lef.</i> 386. |
| (g) 1 <i>Vern.</i> 60. 84. 144. | (p) 16 <i>Ves.</i> 206. |
| (h) 1 <i>Vern.</i> 90. 453. 460. 469. | (q) 3 <i>P. Wms.</i> 242. |
| (i) 1 <i>Dick.</i> 426. | (r) 2 <i>Ves. & B.</i> 359. See also |
| (k) 2 <i>Ch. Ca.</i> 200. 3 <i>Swan.</i> 529. | <i>Ormerod v. Hardman</i> , 5 <i>Ves.</i> 722. |
| (l) 3 <i>Bro. C. C.</i> 45. 1 <i>Harg.</i> | <i>Mackintosh v. Townsend</i> , 16 <i>Ves.</i> |
| <i>Jurid. Arg.</i> 453., where most of | 330. |

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DEERHURST

v.
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The VICE-CHANCELLOR.

DEERHURST

^{v.}
The Duke of
St. ALBAN'S.

This is a question that admits of no doubt, because, though the early books shew a repetition of rehearings to a great and injurious extent, yet the case of *For v. Macreth* before Lord *Thurlow* has in fact decided the very point now in contest. That case was first heard by Lord *Kenyon*, at the Rolls, then on appeal by Lord *Thurlow*, when his Lordship affirmed the judgment of the Master of the Rolls; and on the party attempting to have a second rehearing before the Lord Chancellor, his Lordship considered the point, and expressly decided against it: there was then an appeal to the House of Lords, and no objection was made to the course which Lord *Thurlow* had taken. It also appears that in the year 1807 the same doctrine was confirmed in the case of *The East India Company v. Boddam (a)*, before Lord *Erskine*, in which a question of a similar nature came before him: for in that case there had been first a hearing at the Rolls; then an appeal to Lord *Eldon*; and finally a petition of appeal against his Lordship's decree, which Lord *Erskine* after argument refused to rehear.

In this case there has been a judgment pronounced by the Master of the Rolls when Vice-Chancellor; a petition of rehearing has been heard and decided by Lord *Lyndhurst*, although his Lordship, in consequence of the reasons assigned, did not state the grounds of his judgment at length; and now the attempt is to have the appeal reheard before the Lord Chancellor, who stands in the same situation as Lord *Lyndhurst* would have done, had the application been made to him. It appears to me that the present case is completely bound by the authorities referred to, and that the cases of *Brown v. Higgs*

(a) 13 *Ves.* 421.

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v. *Higgs* (a) and *Blackburn v. Jepson* (b) form no exceptions to the rule which those authorities establish; for in *Brown v. Higgs* there had been a rehearing at the Rolls, and then the Lord Chancellor heard the cause when it was brought before him on a petition of rehearing; and the like state of circumstances existed in *Blackburn v. Jepson*. But this is not the state of circumstances we are now dealing with, the question here being, whether, when the Judge below has given a decision which has been solemnly confirmed by the decision of the Court above, that same Judge shall be called upon to rehear his decision. If, however, instead of having it already fixed, we wanted a rule, it would be wiser to adopt that of *Fox v. Macreth* (c) than to leave the matter in doubt and uncertainty.

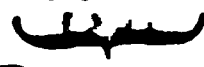
The MASTER of the ROLLS.

The more regular mode would perhaps be, that the party opposing a second rehearing should apply to have the petition of rehearing removed from the paper of appeals; but I presume his Lordship on a point of so much importance, will not prevent a decision of the question upon a mere ground of form. I consider this as an application to rehear a judgment of Lord *Lyndhurst*, after his Lordship has pronounced a decision affirming that of the Judge in the Court below.

It does not appear to me that we are to adopt any general rule with respect to rehearings, and I do not think that any such rule can be laid down as was insisted upon in argument. *Brown v. Higgs* and *Blackburn v. Jepson* would not fall within the principle attempted to be established, for they were both causes in which two rehearings were allowed. But the question now is, not whether

(a) 3 *Ves.* 561. (b) 2 *Ves. & B.* 359. (c) *Bro. C. C.* 451.

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Duke ofThe Duke of
St. Albans.

1831.

ther there is to be a rehearing after a judgment at the Rolls, but whether, after there has been a hearing in the Court below and another in the Court above, the judgment on that second hearing shall be again reheard. Upon this point Lord *Eldon's* opinion in *Brown v. Higgs* is extremely distinct. There the appeal called for his judgment, and he said very properly, that he would not consent that the judgment should go to the House of Lords as affirmed by him, without hearing the argument upon it. That is a very different thing from permitting a rehearing of an appeal which the Lord Chancellor has already once heard.


It is not, I presume, contended here that there is any absolute necessity of there being no more than two hearings. It is plainly a matter of discretion in the Court above, whether, after a hearing in two distinct Courts, a rehearing shall be permitted. In the early reports the practice appears to have been to allow rehearings as often as the caprice or passions of the parties prompted: but it cannot be pretended that the present practice is to be governed by such precedents; and indeed we find from the case cited from *Peere Williams (a)*, that in Lord *Talbot's* time, his Lordship considered it as discretionary whether he should permit more than one rehearing. In *Fox v. Macreth (b)*, Lord *Thurlow* is to be considered as adopting this rule, that if there has been any decision in the Court below, and afterwards one in the Court above, the latter Court is not bound to grant the parties a rehearing as a matter of course; but that special circumstances may be shewn that would induce the Court to give such permission: and Lord *Thurlow* in the judgment that has been cited, distinctly denied that any authority should ever prevent him from adopting that rule.

It

(a) *Buck v. Fawcett*, 3 P. Wms. 242.

(b) 5 Bro. C. C. 45.


It was said the rule ought to be established by the legislature. That opinion, however, cannot be seriously stated. The Lord Chancellor has a right to adopt those rules of practice which will, in his opinion, promote the ends of justice. Lord *Thurlow's* rule has been followed by Lord *Erskine*; and the question is, whether the Lord Chancellor should now depart from that rule. Now it would not, I conceive, be expedient for the administration of justice, or consistent with the rule sanctioned with that view, that after two authorities have been determined, on so much consideration, a judge should wantonly depart from them.

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 v.
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But if those authorities had never existed, the question might still be considered upon the reason and principle of the thing. The party now asking a rehearing has already had one judgment of the Vice-Chancellor's Court, and a second judgment by the Lord Chancellor; and now he applies to have the judgment reheard: it being still open to him to have a third judgment by way of appeal to the House of Lords. Is that application consistent with reason and equity? or would it not rather be an encouragement to vexatious litigation to accede to it? I am therefore of opinion that the rule is now settled, not in ordinary cases to permit a rehearing before the Lord Chancellor; and if it were not so settled, I should submit that such a rule ought now to be adopted.

The LORD CHANCELLOR.

I entirely agree with their Honors in the view they have taken of this case, and upon the authorities to which they have referred it. The reason why I was anxious to have their assistance was partly personal to myself, viz., that the question disposed of in one way, would

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 v.
 The Duke of
 ST. ALBAN'S.

save me from a considerable labour,—I mean the hearing of two most important appeals, the one at the bar, and the other that of *Fournier v. Paine*. (a) But I was also anxious that it should receive full discussion, and that the weight of their authority should be added to the decision of the Court, because, though the case appeared to leave no reasonable doubt as to what the course ought to be, yet it clearly appears that some degree of uncertainty must have existed, and that the question has in some sort been considered as open. In neither case,—neither in the one before us, nor in *Fournier v. Payne*, was an application made to discharge the order for setting down the petition of rehearing, but the Respondents reserved the point till the cause came on, and then took it as a preliminary objection. Upon looking into the cases, I find that Lord *Thurlow* gave a solemn and deliberate opinion upon the very point. He himself directed attendance upon the petition, and then counsel being fully heard upon that attendance, after taking time, he delivered that judgment which has been considered in *The East India Company v. Boddam* (b) as settling the rule. And though it was said that *The East India Company v. Boddam* was only the case of *Fox v. Macreth* over again, that certainly is no reason why it should not be taken as evidence that the practice and understanding of the profession continued to be as *Fox v. Macreth* (c) had determined.

I apprehend that the distinction is justly taken between two rehearings in the Court below, and two upon

(a) 3 *Mylne & Keen*, 207. n. It ought to have been there stated, that the contest in that case was with respect to the right to a second rehearing of an order made upon exceptions: that rehearing was refused; but

the cause itself was afterwards heard and determined by Lord *Brougham*, on an appeal from the original decree.


(b) 13 *Ves.* 421.

(c) 3 *Bro. C. C.* 45.

CASES IN CHANCERY.

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upon appeal here; not only for the reason adverted to in the argument, but also on the ground suggested by Sir *E. Sugden* in his reply, viz. the difference there may be between the first hearing of the cause and the hearing in the later stage, when it has received its utmost preparation, and every topic of argument has been weighed and considered. It is, of course, much fitter that after the cause has arrived at this latter stage, a very narrow limit should be fixed to such a power of rehearing.

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v.
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I understand there is no intention, on either side, to hold that the rule is absolute and inflexible. But it may well be made a question whether it should be of course to set down the petition of appeal, under such circumstances, leaving the Respondent to raise the objection; or whether, for the purpose of having the liberty, a special application, shewing circumstances to induce the Court to grant it, should not be required. Where a case, however, presents circumstances of that kind, this rule, I will not say now adopted, but rather followed from the former cases, would by no means preclude any such application. (a)

Sir *E. Sugden* then applied that the petition might be dismissed, which, after some discussion, was ordered, without costs. (b)

(a) This case has been since considered and followed in *Mousley v. Carr*, 3 *Mylne & Keen*, 205. See also *The Attorney-General v. Ward*, 1 *Mylne & Craig*, 449.

ried to the House of Lords, where the judgment of Sir *John Leach*, on the merits, was reversed; *nom. Tollemache v. The Earl of Coventry*, 2 *Cl. & Fin.* 611.

(b) The case was finally car-

1831.


Aug. 11, 12.
15.

MOYLE v. MOYLE.

Trustees and executors who, for upwards of a year after their testator's death, allowed a considerable portion of the assets to lie unproductive in the hands of a banker who failed, were, under the circumstances, charged with the loss.

THE testator, *John Moyle*, gave the residue of his personal estate and effects to the Defendants, *Charles Moyle*, *John Smith*, and *Robert Corser*, his trustees and executors, upon trust, with all convenient speed, to call in his debts, and to sell and convert into money such parts of his personal estate as should not consist of money, and thereout to satisfy his debts and legacies, and subject thereto, upon trust, to invest the clear surplus in the purchase of three per cent. consols, or some other of the parliamentary stocks, and to apply the dividends, or so much thereof as should be necessary, towards the maintenance and education of his daughter, until her age of twenty-one or marriage; and afterwards, upon trust, to transfer the principal to her for own use; with a bequest over, in the event of her dying under that age and unmarried, to his brother and sister equally. The will further directed that any surplus of interest beyond what was required for the maintenance of the daughter, should be, from time to time, invested in the same stock and added to the principal. It also contained the usual clauses, that the trustees should be liable each for his own acts and default only, and that they should not be answerable for more of the trust-monies than should come to their hands respectively; nor for any loss or damage which might happen without their wilful default, or by the misfeasance, failure, or insolvency of any banker, with whom the trust-monies might be lodged for safe custody or investment, or otherwise in the execution of the trusts.

The testator died in the month of *June* 1823. In the month of *October*, in the same year, the bill was filed by his infant daughter, by her mother and next friend, praying to have the accounts of the estate taken, and the Plaintiff's rights under the will ascertained and secured. In *March* 1824 the Defendants, the trustees and executors, put in their answer. A motion, against them, in the following *May*, that they might pay into Court a balance of 260*l.*, appearing by their answer to be then in their hands, was refused; and on the 29th of *January* 1825 the usual decree was made.

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 v.
 MOYLE.

When the Master made his report, an exception was taken to it, by the trustees and executors, on the ground that they were thereby charged with a sum of 928*l.*, which they had claimed to be allowed in their discharge. The sum in question belonged to the testator's estate, and was the amount of a balance which was lying in the hands of Messrs. *Sikes* and Co., bankers, of *London*, on the 13th of *December* 1825, the day on which that house stopped payment. It appeared that *Sikes* and Co. had been the testator's bankers, and that, after his death, they continued to be employed as the bankers of the trust-estate. One of the trustees and executors was the testator's brother, to whom a moiety of the residuary property was given over, absolutely, in the event of the Plaintiff dying under age and unmarried.

The MASTER of the ROLLS made an order, allowing the exception; and the Plaintiff appealed to the Lord Chancellor.

Sir *E. Sugden* and Mr. *Walker*, for the appeal.

The *Solicitor-General* and Mr. *James*, for the exception.

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 v.
 MOYLE.

The particular circumstances of the case and the principal arguments urged in support of the exception, are stated and considered in the judgment. The only authority referred to was *Salway v. Salway* (a).

Aug. 15.

The Lord CHANCELLOR [after stating the will].

The testator died in the same month in which he made the will. A bill was speedily filed for the administration of his estate; and in the course of the proceedings in that suit, and in the month of *May* 1824, a sum of 260*l.* being then in the hands of the Defendants, the executors, a motion was made by the Plaintiff to have that sum paid into Court. The motion was successfully resisted; partly because it appeared that a year had not elapsed from the time of the testator's death, and partly, also, because the sum was in itself so inconsiderable in amount. A decree was eventually obtained in *January* 1825; nearly a twelvemonth — upon the lapse of which the present question principally arises — was then suffered to pass; and late in the same year (1825) Messrs. *Sikes* and Co. failed, with the money (which had now been increased to 900*l.* and upwards) in their hands; and the question is whether the loss consequent upon that failure, shall fall on the executors or on the residuary legatee.

As there is a *prima facie* case in which it was the duty of the executors to have invested the fund with all convenient speed, or, at all events, immediately after the decree in 1825, the question is whether they have shewn a case which is sufficient to excuse them for having neglected so to do.

The

(a) 4 *Russ.* 60. and 2 *Russ. & Mylne*, 215.

The first excuse they set up is that there was an unfortunate lease of premises in the city, occupied as an oyster shop: this lease had been assigned by the testator without taking a covenant from the assignee to relieve him from liability for the rent, which amounted to 100*l.* a year, and without any reservation of a power of re-entry in case of non-payment. It is further alleged, that the premises were in a dilapidated state, and that the tenant used to shut up the lower part of the house, and occupy the upper story; and that it was at certain seasons only that he could make any payments towards the rent at all. For these reasons it was contended that the trustees were under the necessity of keeping a considerable balance in their hands. There can be no doubt, however, that if the Defendants, after paying the money into Court, had been called upon by an action brought by the superior landlord for the rent, this Court, having then the possession of the fund, would have interfered for their protection; or would, upon their application, have made an immediate order, placing at their disposal the necessary sum to meet the landlord's demand. But there was no necessity for paying the money into Court. If they had merely invested it, that would have been sufficient; and the greater the prospect of their liability to pay the rent, the more incumbent was it upon them to render the fund productive in the mean time, by investing it in such a manner as to yield a profitable return.

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 MOYLE
 v.
 MOYLE.

The next excuse set up was that several letters were written by the solicitor of the executors, Mr. *Bolton*, to the solicitors of Mrs. *Moyle*, pressing them to consult with their client to come to some arrangement, chiefly indeed respecting the lease, one or two of them, however, with respect to the fund lying unproductive. The letters shew undoubtedly that there was a certain disposition to invest

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Mort

v.

Mort.

the money, which does not seem to have been properly met on the other side; for no answer appears to have been returned to these proposals. But the executors ought to have known that it was not necessary to have any conference or arrangement, or any consent on the part of the Plaintiff to the investment, and that they might either by a common order have had the fund paid into Court in the cause, or without such an order, on their own authority, have invested it in their own names. But it does appear from the correspondence, on looking into it more narrowly, that there was some disinclination and opposition to payment of the money. In a letter written in *February* 1825, Mr. Corser expresses himself thus, "No money will be paid so long as that lease subsists." Now, why the executors should retain more than one year's rent I am at a loss to understand: such an expression shews that it was not altogether from omission or mere laches, but rather from an ill considered view of what they thought necessary to their own security, that they refrained from investing the money. And Mr. Bolton's letter assigns the lease as a reason why he will oppose, as his clients had all along resisted, and successfully resisted, any attempt to make them pay it into Court.

In the course of the argument it was asked, why the executors did not at the very commencement of the panic, which lasted for several days, take instant and active steps for drawing out the assets in the bankers' hands and paying them into Court. In answer it was said they could not do so, because an arrangement had been made for security's sake, that they should all concur in signing the cheques; and that one of their number, Mr. Smith, having failed in the preceding *September*, he was out of the way at the time. This might have been a satisfactory answer, if it had been borne out by the facts.

But

But the affidavit swears very cautiously as to *Smith* being out of the way, and does not state that he was out of the way except at the end of the year. Besides, the arrangement is distinctly sworn to have been, not that all the three, but that two out of the three should concur in signing the cheques. Now *Corser* lived in *London*, and *Charles Moyle* in *Shropshire*; and the former might at least have made the attempt of writing on the *Monday*, the day on which the panic began; but no attempt was made.

1891.

MORIS
v.
MORAN.

Taking the whole of these circumstances into my consideration, it is impossible for me to hold, that the trustees have sufficiently shewn that there was no laches on their part. To permit such laxity would be most dangerous. A man may renounce a trust, or he may refuse to undertake it, but having once accepted it, whether as executor or as trustee, he must discharge its duties, so long as his character of trustee subsists; for, by consenting to assume the office, he prevents other persons from being appointed, or accepting, who might have more time and leisure to devote to it. It is no excuse, therefore, that the parties are volunteers; for they are greatly to blame in consenting to act, if they really have not time for the due performance of their duty, and injury is sustained in consequence.

In this case it is clear that, if these executors had been acting in their own affairs, they would not have allowed so large a sum to lie unproductive in the hands of a banker, exposed to the hazard of his failure. If they had entertained any doubt with respect to the necessity for a conference, they might have taken the advice of their solicitor, or have applied to counsel.

What

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v.

MOYLE.

What pressed me most at the hearing was the argument as to the apportionment of the liability. It was argued that in any event 260*l.* was held, on the motion, not to be too much for the executors to retain. True, it was not so considered within a year after the testator's death; and the Court might then well say it was not worth while to order them to pay in the money when the whole sum in hand was so small. But if it had been so large in amount as the sum now in question, the Court would no doubt have acted differently, and would have said at once — You must invest the whole. They were not in my opinion justified in retaining it; and it would be giving a most dangerous latitude to allow executors to defend themselves by saying, “We were afraid that blame would be cast on us in case the price of stocks fell;” an apprehension quite unreasonable and absurd; for no one could have justly censured them. It is to be observed, besides, that if the Court had directed an investment, it would have ordered the whole, and not merely a part, to be invested.

For these reasons I am of opinion that the order of His Honor, allowing the exception, should be reversed, and that the exception must be over-ruled.

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BY letters patent, which were in the *Latin* language, and were dated the 9th of *October* in the eighth year of the reign of King *James I.*, reciting that a certain college or hospital was then lately discovered to have been founded in the suburbs of the town of *Colchester*, in the county of *Essex*, by *Eudo Dapifer*, formerly seneschal of King *Henry I.* after the conquest, commonly called the hospital of *St. Mary Magdalen* in the suburbs of the town of *Colchester*, for the habitation of lepers and infirm persons, for whose relief and support in those parts, as well the said *Eudo Dapifer*, as different Kings of *England*, and different other persons of old time, had granted or intended to grant certain manors, messuages, lands, and hereditaments; and reciting that his Majesty was given to understand that the said college or hospital had fallen into decay, and that the chapel of the college was in total ruin, and that the lands, tenements, and other possessions of the said college or hospital were in great measure dissipated and alienated, and indirectly and unjustly converted from the said pious uses, from which cause the poor of the college or hospital were not relieved or supported according to the intentions of the founders and other

benefactors;

the income and revenues of the lands so granted should be expended for the support of the master and poor of the hospital, and for the maintenance and repairs of the buildings and possessions of the hospital. Under the particular provisions of the letters patent, it was held at the Rolls, that the five poor persons were entitled to share with the master in the increased revenue of the charity lands; but this decision was reversed on appeal.

The master having, in virtue of an agreement with the Comptroller of the Barrack Office, derived a profit upon the sale of the materials of certain barracks which under a lease from the master had been erected on part of the charity lands; it was held, that inasmuch as this agreement, so far as the master was a party to it, grew out of and was incidental to his official situation, the profit was not personal to the master, but was received by him in trust for the charity.

ROLLS.

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Nov. 18.

L. C.

1832.


Dec. 6, 7.

1833.

Jan. 15. 29.

By letters patent of King *James I.* a charitable corporation was created by the name of the Master and Poor of the College or Hospital of King *James*, in the Suburbs of *Colchester*, to consist of a master and five poor persons; and lands were granted to the corporation, with a direction that 52s. yearly should be paid to each of the five poor persons for their support and maintenance; and it was ordained that

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benefactors; and further reciting that his Majesty, as well from his royal care and desire for the support, relief, and maintenance of the poor of his kingdom, as from his inward wishes to perform all offices of charity, was desirous to provide for the foundation and perpetual relief and support of the said college or hospital, and of the master and poor who should be and be maintained in the same, and that the manors, hereditaments, and possessions which had been given or granted to the said college or hospital should be converted to pious uses, according to the pious intentions aforesaid; it was thereby ordained and granted that, from thenceforth and for ever, there should be one college or hospital of the poor, in the suburbs of the town of *Colchester*, for the relief or maintenance of the poor, that should exist for ever, and be called the College or Hospital of King *James* in the Suburbs of the Town of *Colchester*; that it should consist for ever of one master and five poor: and in order that his Majesty's aforesaid intention might the better take effect, and that the goods, lands, tenements, incomes, revenues, and other hereditaments which had been granted and assigned for the perpetual support of the said college or hospital might be better governed and expended for the support and maintenance of the master and poor of the said college or hospital, and for the preservation of the said college or hospital for ever, it was thereby further ordained, that thenceforth and for ever there should be one master of the said college or hospital, and of the goods, chattels, lands, and other possessions thereof, and that he should have the care of the souls of the parishioners of the parish of *St. Mary Magdalen*, in the town of *Colchester*, and he should there celebrate divine service; he should faithfully preach the word of God, and he should administer the sacrament in due manner, either by himself or by some sufficient minister or curate; and

further

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further that there should be five poor persons who alone, either men or women, should be supported, relieved, and maintained in the said college or hospital; and they should be called the poor of the college or Hospital of King *James* in the Suburbs of the Town of *Colchester*; and for their support, relief, and maintenance, they should have, enjoy, and receive through the hands of the said master for the time being, or of his assignees, annually, 52s., which should be paid to the same poor by the same master for the time being, or by his assignees, by equal quarterly payments of 13s. each, at the four usual feasts, to be paid for ever yearly to each of the said poor. And his Majesty thereby appointed *Henry Davye*, one of his chaplains, to be the first master of the said college or hospital, and of all the lands, manors, hereditaments, and possessions thereof; commanding that the same *Henry Davye*, so long as he should remain in the office of master, should faithfully and diligently celebrate divine service, should preach the word of God and administer the sacrament, either by himself or by a sufficient deputy, as well to the poor of the college or hospital, as to the parishioners of the parish of *St. Mary Magdalen* in *Colchester*, in the parish church of *St. Mary Magdalen* aforesaid, adjoining to the said college or hospital; and his Majesty thereby also appointed the five persons therein named to be the first poor of the said college or hospital, to continue in the same during the term of their natural lives, unless in the meantime for any reasonable cause they or any of them should be removed: and his Majesty willed that these poor should be removed by the master of the said college or hospital as often as the case should require: and it was his Majesty's further will and pleasure that, whenever it should happen that any one or more of the said five poor should die or be removed

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moved from the college or hospital, it should then be lawful for the said *Henry Davye*, and for his successors the masters for the time being, to elect and appoint one or more others in the place of him or them so happening to die or be removed, to supply the aforesaid number of five poor. And his Majesty thereby further granted and ordained that the said master and poor of the said college or hospital, and their successors thenceforth for ever, should be and they were thereby created and constituted a body corporate and politic, by the name of "the master and poor of the college or hospital of king *James*, in the suburbs of the town of *Colchester*." And his Majesty thereby further ordained that the chancellor or keeper of the great seal of *England* for the time being, should be visitor of the said college or hospital, and should from time to time, and as often as might be necessary, inspect and visit the same, and the master and poor of the college, and the state, order, and government thereof; and that as often as the master of the college or hospital should die or be removed from his office, it should be lawful for the visitor for the time being to appoint a fit, sufficient, and honest person to be such master. And the master of the said college or hospital for the time being was thereby authorised and empowered, with the consent of the attorney-general and solicitor-general for the time being, or either of them, to make, ordain, and establish good, useful, and wholesome statutes, laws, and ordinances in writing, touching the government, election, expulsion, punishment, order, and direction of the master and poor of the college, and to appoint any other things whatever concerning the college, and the ordering and disposal of the goods, rents, revenues, and possessions thereof; which statutes, laws, and ordinances his Majesty thereby enjoined to be inviolably observed for ever. And it was thereby further ordained,

ordained, that the income and revenues of all the manors, lands, hereditaments, and possessions, which had been theretofore or should thereafter be given to the perpetual support and maintenance of the said college or hospital, should be disposed of and expended for the support of the master and poor of the college or hospital for the time being, and for the support, maintenance, and repairs of the houses, tenements, and possessions of the college or hospital, according to the statutes, laws, and ordinances aforesaid, and for no other uses or purposes whatsoever.

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By virtue of the power conferred in the letters patent, *Henry Davye*, the first master of the hospital, with the consent of Sir *Francis Bacon*, then attorney-general of his Majesty King *James I.*, drew up and published a body of laws and statutes, for the regulation of the hospital and its members. These laws and statutes had reference principally to the powers and duties of the master, in nominating, governing, controlling, and removing the five poor persons, and in managing the concerns and property of the hospital; but partly also to the conduct and obligations of the poor. Among other things it was thereby declared, that the master, to the best of his power, should maintain the rights and privileges of the hospital, and not demise the possessions or revenues of the same; and should keep and maintain all the houses and buildings of the hospital well and sufficiently repaired, so that they might be fit and convenient for the habitation of the master and poor; that he should not make any demise or grant of a field called *Magdalen*, nor of the woods in the parish of *Layer de la Haye*, but only such as should determine and cease, by the death of the master who should make the same. That he should provide and maintain one strong chest, continually to stand in the hospital house belonging to the said master, where

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where he should keep his Majesty's letters patent of the foundation, as also the common seal, and all the evidences and writings of the hospital, and should likewise provide and maintain one register book, to be kept in the said chest, wherein he should register from time to time the names of the poor, and the day and year of their election; and therein should be set down the names of the several lands belonging to the hospital, and where the same lay, and such other matters as to his knowledge should tend to preserve the privileges, rights, and possessions of the hospital. And it was also thereby declared, that the poor of the said hospital, should diligently and frequently hear divine service and sermons, in the parish church of *Mary Magdalen*, in *Colchester*, and should receive the sacrament there four times in the year, at the least: that they should be obedient to the master in all things lawful and convenient, and should, to the best of their power, maintain the rights and privileges of the hospital: that they should reside in their several houses that should be appointed unto them by the master; and none of them should lodge a-night elsewhere without the licence of the master or his deputy, on some reasonable cause to be allowed by him; neither should they receive any person to lodge a-night in any of their houses, without the special licence of the master or his deputy.

The annual income derived from the property and possessions of the hospital had greatly increased of late years, and now amounted to 350*l.* and upwards, but no increase had been at any time made in the yearly payment of 52*s.* to each of the five poor persons; and the whole revenue of the charity, after satisfying those five yearly payments, had, from the time when the hospital was established, been uniformly received and applied by the master for the time being to his own use.

In
 1651

In the years 1796 and 1797 respectively, two leases of parts of the charity lands were granted by the then master of the college to the officers of the board of ordnance, for the terms of 21 years, each, at certain rents, for the purpose of building barracks; and those leases contained covenants that, at the expiration of the respective terms, the officers of the board of ordnance should be at liberty to remove all buildings which should be erected on the demised lands, they filling up all the holes and levelling the ground, and also twice ploughing the lands full eight inches deep, and paying a fine to the master and poor of the college of two years' rent of the premises.

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After the expiration of these two leases, and on the 18th of *May* 1818, an agreement was entered into between the Defendant, who had then become master of the college, and the comptroller of the barrack office, by which it was provided that the whole of the barrack buildings erected on the premises which had been so demised should be sold by auction; and that one moiety of the sum to be produced by such sale should be appropriated, first, in paying to the Defendant, as master of the college, two sums of 60*l.* 18*s.* and 83*l.* 10*s.*, being the fines covenanted to be paid at the expiration of the leases; and then, that the residue of such moiety should be received by the Defendant, in consideration of his filling up the holes and levelling the ground and ploughing it in the manner covenanted to be performed as aforesaid by the lessees, and also as a full compensation and satisfaction for the injury which had been done to the land comprised in the two leases, or to the soil thereof, by reason of the barracks and other buildings having been erected and built thereon.

In pursuance of this agreement, the barrack buildings were pulled down and the materials sold; and the moiety

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of the proceeds, which was paid to the Defendant, exceeded the sum of 5000*l.*, the whole of which, after defraying the expenses of filling up the holes and leveling and ploughing the ground, the Defendant treated as his own private property, and applied to his own use.

The information, which was filed against the Rev. *John Robert Smythies*, the present master of the college, after setting forth the letters patent, and stating the facts before mentioned, went on to charge that, in consequence of the great rise in the price of provisions, the yearly allowance of 52*s.* each had become wholly inadequate to the support and maintenance of the poor belonging to the hospital, and that some of them were then in the receipt of parochial relief; that in consequence of the length of time which had elapsed since the foundation of the charity, and the augmented value of the estates, the yearly allowance to the five poor persons ought to be increased so as to be adequate to their support and maintenance. It further charged that the Defendant had for many years resided at *Leominster* in *Herefordshire*, and that he only visited *Colchester* occasionally, for the purpose of receiving the rents of the estate, contrary to the directions contained in the letters patent; and it prayed that an account might be taken of the charity estates, and of all sums of money received by the Defendant in respect of the same; and that it might be referred to the Master to inquire and state what, if any thing, ought to be allowed for the increase of the maintenance of the five poor persons; and also to consider and approve of a scheme for their future support and maintenance.

The Defendant, by his answer, admitted that his ordinary and permanent residence was at *Leominster*, and that he only visited *Colchester* occasionally, for the purpose of looking after the management of the hospital
 and

and its estates; and further that he had received, after deducting expenses, a clear sum of 5000*l.* from one moiety of the proceeds of the sale of the barrack materials.


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A motion that the Defendant might be ordered to pay this sum into Court was resisted upon the ground that the fund in question was not trust-money belonging to the charity, but was rather to be regarded as in the nature of a windfall; and that to make such an order now would be virtually to decide the question of right upon an interlocutory application.

The LORD CHANCELLOR refused the motion, observing that the question whether the 5000*l.* were to be considered as in the nature of profit or a windfall, the view to which he at present rather inclined, or as forming part of the capital stock of the charity, was proper to be discussed and determined at the hearing; and that nothing appeared to shew that the fund was exposed to any danger by being left till then in the hands of the Defendant.

At the hearing of the cause before Sir *John Leach*, Master of the Rolls, two questions were raised; first, whether the master was exclusively entitled to the surplus revenues of the charity property, after paying the yearly sums of 52*s.* each to the five poor persons, or whether the five poor persons ought not to share in the increased rents of the charity estate; and secondly, whether the moiety of the proceeds, received by the Defendant from the sale of the barrack buildings, after deducting the expenses incurred by the Defendant in filling up the holes and levelling and ploughing the ground, was or was not to be considered as trust-money belonging to the charity.

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Mr. *Pemberton* and Mr. *Skirrow*, in support of the information.

Mr. *Bickersteth* and Mr. *Spence*, for the Defendant, the master of the hospital.


The MASTER of the ROLLS.

This appears to me to be a case that admits of very little doubt. It is truly stated that it is a new case, and I do not recollect that a similar case has been brought before the Court. In other cases the question has been whether the revenues of the property were to be applied wholly to the charitable purposes expressed in the letters patent, or whether the corporation to whom the property was given were to enjoy the surplus revenue which should remain after the payment of certain specified sums.


In this case it is clear, and is admitted, that the whole revenue is to be applied to the charitable uses expressed in the letters patent; and the question is, whether the benefit of the increased value of the property is to accrue wholly for the benefit of the master, or is to any extent to be shared by the five poor persons. The increase of the income of the charity estates, not being contemplated at the time of the letters patent, is not therein expressly provided for; and the provisions of the letters patent are therefore to be carefully examined, in order to see whether the general intention of King *James* can have effect, if the whole benefit of the increase is confined to the master.

In the first place it is to be observed, that the new corporation is declared to be capable of acquiring lands and tenements for the support, relief, and main-
 tenance

tenance of the master and poor; and it is afterwards ordered and enjoined that all the income and revenues of the lands then given and thereafter to be acquired, shall be disposed of and expended for the support of the master and poor; and it is, therefore, not reasonable to presume an intention on the part of King *James* that the master alone should have the benefit of all future grants. But the most material consideration is that it is apparent upon the letters patent that it was the intention of the King that the five poor persons should be wholly maintained and supported out of the revenues of the charity, and that the yearly sum of 52s. for each is therein mentioned as a sum which was, at that time, adequate to such support and maintenance; and there is an express authority given to the master, with the consent of the Attorney-General and Solicitor-General, from time to time to make statutes and ordinances, and among other things, touching the ordering and regulation and disposal of the goods, possessions, rents, and revenues of the college. Under this authority the general intention of the King to provide for the full support and maintenance of the five poor persons out of the revenues of the charity might and ought to have been carried into effect, and may now be enforced by this Court.

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With respect to the sum received by the Defendant under his agreement with the comptroller of the barrack office, it is plain that this agreement grew out of the situation of the Defendant as master of the college, it being provided by the agreement that the rents due to the college shall be paid to him, and one part of the agreement being in consideration of the injury which had been done to the soil of the charity property by the building of the barracks. From a dealing in this character, the Defendant, upon the settled principles of

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a court of equity, cannot claim the profit as a personal benefit, and he must account as a trustee for the charity for the amount received by him under the agreement; but inasmuch as no statute or ordinance has been hitherto made for depriving the master of the surplus revenue, after the payment of the five yearly sums of 52s., the Defendant will, up to this time, be entitled to the interest of what shall be found due from him upon that account.

The decree commenced as follows : — “ It appearing to have been the general intent of the letters patent that the annual allowance to be made to the five poor persons should be sufficient for their maintenance, even if incapable of labour; and it being provided by the said letters patent that the master of the hospital, together with the Attorney and Solicitor-General for the time being, should have power to make and establish statutes, laws, and ordinances in writing for the disposition of the property and revenues of the said charity, his Honor doth declare that, notwithstanding the particular intent expressed in the letters patent as to the 52s., which must have prevailed in case there had been no increase of the revenues of the charity, the master of the said hospital is not now entitled to the whole income of the charity property, subject only to the annual payments of the said 52s. yearly to the said five poor persons: and his Honor doth declare that the profit made by the Defendant, *John Robert Smythies*, in respect of his agreement with the officers of the Board of Ordnance, and His Majesty’s Comptroller of the barrack department, bearing date the 18th day of *May*, 1818, in the pleadings mentioned, being a consequence of his situation as master and trustee of the said charity, such profit was to be considered

sidered as the property of the said charity, and that the Defendant, *John Robert Smythies*, as master, was entitled only to the interest or income arising therefrom." The decree then proceeded to direct that the Master should take the usual accounts of the charity estates; and that any of the parties should be at liberty to lay before him a scheme for the due regulation of the charity and the management of the estates belonging thereto, and for applying the rents and profits, regard being had to the present annual value thereof, for the support and maintenance of the said master of the hospital and the said five poor persons; and such scheme was to be approved of by the said Master, in concurrence with the Attorney and Solicitor-General for the time being, &c.

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The Defendant presented a petition of appeal against his Honor's decree.

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The appeal came on to be heard before the Lord Chancellor in the month of *December* 1832, when it was argued by Mr. *Spence* and Mr. *Rudall*, for the appellant, and by Mr. *O. Anderdon*, for the relators.

The Lord Chancellor said he was disposed to concur in the view taken by the Master of the Rolls as to that part of the decree which declared that the money received from the proceeds of the sale of the barrack materials formed part of the charity property; but on the other and more important question raised, with respect to the right of the almsmen to share with the master in the increased revenues of the hospital, he entertained considerable doubt. It would, therefore, be very satisfactory to him to have the case further considered and discussed with reference to that point.

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It was finally arranged, that the question should be re-argued by one counsel on each side.

Sir *E. Sugden*, in support of the decree.

The question turns entirely upon the construction and effect of the letters patent by which the hospital is incorporated and endowed; for the general principles of the Court, with respect to the application of the surplus revenues of charity estates, are settled and indisputable. Wherever there is a general dedication of the fund to charity, although the particular objects specified do not exhaust the whole, then whatever the surplus or the subsequent increase may be, charity is entitled to that surplus or increase to the exclusion of the heir-at-law or next of kin; *Arnold v. The Attorney-General* (a). So again, if the fund is portioned out among different charitable objects which completely exhaust it, those objects are entitled in the like proportions to share the benefit of any subsequent increase; *The Attorney-General v. Johnstone* (b), *The Attorney-General v. Sparks* (c). And the rule is the same where, after certain aliquot portions have been allotted to particular objects, the residue, and that an ascertained amount, is devised to another object of charity: for in neither case can any difficulty arise in settling the proportions in which the increase shall be distributed among all the specified objects. The latter is the *Thetford School Case* (d). The case at bar rather resembles the case of *Arnold v. The Attorney-General* already cited, in which there was a plain dedication of the whole to charity, but the objects specified left part of the fund unapplied; and it differs from the *Thetford School* case in the circumstance of there being no clear appropriation of the whole fund in fixed

(a) *Show. P. C.* 22.

(b) *Amb.* 577.

(c) *Amb.* 201.

(d) 8 *Rep.* 130.

fixed proportions to different objects. In the *Thetford School* case, however, according to Lord *Coke's* report, a principle was laid down by the Judges which is strongly applicable to the case before the Court, and which ought to be decisive of the question. The words of the report are these ; — “ They said that this case concerned the colleges in the universities of *Cambridge* and *Oxford* and other colleges &c. For in ancient time when lands were of small yearly value (victuals then being cheap) and were given for the maintenance of poor scholars, &c. and that every scholar &c. should have 1*d.* or 1½*d.* a day, that then such small allowance was competent, in respect of the price of victuals and the yearly value of land ; and now the price of victuals being increased, and with them the annual value of the lands, it would be now injurious to allow a poor scholar 1*d.* or 1½*d.* a day, which cannot keep him, and to convert the residue to private uses, where in right the whole ought to be employed to the maintenance or increase (if it may be) of such works of piety and charity which the founder has expressed ; and nothing to any private use : for every college is seised *in jure collegii, scilicet*, to the intent that the members of the college, according to the intent of the founder, should take the benefit, and that nothing should be converted to private uses.” The case thus put by the Judges is the identical case under appeal. Estates were, by these letters patent, given to a corporation, consisting of a master and five almsmen, upon trust to pay to certain members of the corporation, namely the almsmen, 52*s.* a year each for their support and maintenance, and to apply the residue to the upholding and repair of the buildings. From the great depreciation which has taken place in the value of money since the time when the hospital was founded, the stipends allotted for the maintenance of the almsmen have become utterly inadequate

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adequate for that purpose, and as the rents of the estates have largely increased, it is equally reasonable in itself and consistent with the doctrine laid down by the Judges in the *Thetford School* case, that the increased revenues of the hospital, subject to the outgoings for the necessary repairs, should in the first place be applied in raising the amount of the allowances to the almsmen, so as to provide them with a competent maintenance according to the price of provisions at the present day.

This view of the intent of the charity is strongly corroborated by an examination of the particular language and clauses of the letters patent, which may be considered as the charter of the corporation. From that charter it is manifest that the poor who were to be maintained in the hospital were the leading and, indeed, the only express objects of the founder's bounty. Every line of it, from the beginning to the close, favours the construction for which the relators contend. The charter commences by reciting that the hospital had been established in remote times for the habitation of lepers and infirm persons, but had fallen into decay; that the lands and possessions of the hospital, given for the relief and support of the poor of the hospital, were in a great measure dissipated, so that the poor of the hospital were not supported according to the intention of the founder and the other benefactors; and it then goes on to ordain that there shall be one college or hospital of the poor for the relief and sustenance of the poor. The poor, therefore, and the poor only, were the objects for whose special benefit, it appears as well from the recitals as the operative part of the charter, the hospital was both originally instituted, and afterwards re-established and incorporated by King *James*. The appointment of the master who is to select

select the almsmen, and preside over and manage the hospital and its property, is merely subsidiary to that purpose. Except by implication, indeed, there is no beneficial gift of any portion of the revenues to the master. The estates are given to the corporation of which he is the head, paying first of all 52s. a year to each of the almsmen; and afterwards, for the maintenance and support of the master and five poor. And the restriction, which by the statutes is imposed on alienations of the charity property by the master, plainly shews that the power of disposition vested in that officer, was conferred on him merely as trustee for the hospital, and was not intended to be exercised for his personal benefit. The poor, though individually inferior to the master, are equally with him constituent parts of the corporation, and, as far as beneficial interest is concerned, must have stood in some definite relation to him. The amount of rents which he retained for his own use at the time when the hospital was incorporated, must have borne some stated and ascertainable proportion to the amount received by the almsmen: and that same proportion ought to be observed now, for it never could have been the intention of the charter that the poor, whose support had been so anxiously provided for, should become, as they must become, if the present application of the revenues be upheld, mere dependent paupers, to whom this miserable pittance was to be doled out by the master, while the latter was to put into his own pocket the whole surplus rents of the estates, how enormously soever those rents might increase. The consequences of a contrary construction are absurd and revolting. The almsmen were by the statutes prohibited from begging: they were to be resident, and to be maintained within the walls of the hospital. They were, therefore, prevented from working; and the sum of a shilling a week, a suffi-

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a sufficient allowance in the reign of *James I.*, was allotted to them for their maintenance. The authority given to the Master to make bye-laws with the consent of the Attorney-General and Solicitor-General, in no way affects the question with respect to his beneficial interest. Those bye-laws were only to be for the general regulation of the charity and its estates; and the duty of framing and promulgating them was naturally and properly delegated to that member of the corporation who was placed officially at its head, and who presided over it. The letters conclude by declaring that the income and revenues of all the lands given, or thereafter to be given, to the hospital, shall be expended for the support of the master and poor, and not otherwise. The residue, therefore, after providing for the yearly payments to the five poor, and for the repairs, is given to the corporation generally, the intention being that the five poor should each, in the first place, have a charge on the estates to the extent of 52s. a year, and that the surplus should then be distributed among all the members of the corporation, the poor as well as the master, in such proportions as might seem reasonable, or as the exigency of the case might require. And any increase which may have since taken place in the rents, ought to be apportioned upon the same principle.


Mr. Pepys, contra.

Although the *Thetford School* case must now be considered as law, notwithstanding the doubts thrown out by Lord *Hardwicke*, in consequence of its violating the modern doctrine of a resulting trust in favour of the heir, the *dicta* of the Judges in that case, on which the relators here rely, have been much questioned by Lord *Eldon* in *The Attorney-General v. The Mayor of Bristol* (a) and

(a) 2 Jac. & Walk. 294.

and cannot be maintained as authority at the present day. The true effect of the letters patent was to vest the whole property in the corporation, subject to a fixed charge of 13*l.* a year, in favour of the almsmen. The beneficial interest taken by the poor is strictly limited to that sum, which possibly might, in those early days, be a competent allowance for their maintenance. Whether this really was so or not, however, there is no evidence to shew; and the letters patent themselves furnish no conclusive ground for believing that it was so considered or intended. It by no means follows, because the poor were to reside within the hospital, that they were not to assist in maintaining themselves by the earnings of their own industry; for all that the charter provides is, that each of the five poor persons shall have lodgings rent-free, and a fixed sum of 1*s.* a-week towards his support. The beneficial interest in the residue, subject to that charge and the repairs, was plainly intended to be enjoyed by the master for his own use. It never could be meant that the master, who was required to be a clergyman, doing parochial duty, by himself or a sufficient deputy, should undertake this laborious, responsible, and possibly expensive office, without receiving a single shilling for his trouble. If, however, he was to take any part of the surplus beneficially, why was he not to take the whole? No particular portion of it is allotted to him in terms; and the implication in his favour, which is strong and irresistible, extends to every portion of the income which is not expressly devoted to the other objects. The surplus might, doubtless, at the date of the foundation, bear some vague and general proportion to the amount of the allowances to the poor; it might exceed those allowances in the ratio of five to one or ten to one. But the Court has no *data* upon which to ascertain that ratio now; and the amount must always have been extremely fluctuating

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fluctuating and uncertain; for out of it the master was, in the first place, to defray the necessary outgoings for repairs, and, subject to that deduction, he was to take it for better or worse; while each of the almsmen was to have his 52s. a year certain. The result of the arrangement was, that in years when the repairs were heavy, or the rents failed, the master would get little or nothing; and of course, on the other hand, when the outgoings were light, and the annual profits large, his income would proportionally gain. Suppose the rents, instead of rising, had fallen considerably, will it be contended that the master would have claimed a portion of the 13*l*. allotted to the five poor? And if not, upon what principle can the poor now claim to be admitted to share in the increased revenues of the estates?

If any doubt existed as to the real meaning of the letters patent, although it is submitted there can be none, the uniform and undisputed usage of more than two centuries would weigh powerfully with the Court in determining the question. The construction which the Defendant contends for has been adopted and acted upon from the institution of the hospital up to the present time. The opposite construction, indeed, would not only operate with extreme hardship upon the Defendant, but it would go far to shake the titles of many of the colleges in both universities to the estates from which their principal corporate revenues are derived. It is a well known fact that, in numerous instances, large estates have been given to those bodies to endow particular scholarships or fellowships with certain annual stipends, and that when, in process of time, the rents have risen so as to yield a surplus beyond the amount specified for those objects, the colleges have thrown that surplus into their general funds,

funds, and applied them to their ordinary collegiate purposes (a).

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The principles laid down by Lord *Eldon* in *The Attorney-General v. The Mayor of Bristol* are closely applicable here. In that case his Lordship held that where lands were given to the corporation of *Bristol*, upon certain charitable trusts which did not wholly exhaust the rents, the trustees, although they were themselves, to a limited extent, objects of the donor's bounty, were, nevertheless, justified in treating the whole of the surplus, and its subsequent increase, as a fund applicable to the general purposes of the corporation. These principles were afterwards again recognised by the same great Judge in *The Attorney-General v. The Skinners' Company* (b). If there were any just grounds of complaint against the mode in which the revenues of this hospital have been distributed or applied, the proper course would be for the parties conceiving themselves aggrieved to apply, by petition, to the Lord Chancellor, who has the exclusive jurisdiction as visitor, and not to file an information in the Court of Chancery, which, under the circumstances, has no jurisdiction.

Sir *E. Sugden*, in reply, observed that the case of the corporation of *Bristol*, had no analogy; for, in that case, the claim made to the surplus, and to the justice of which Lord *Eldon* acceded, was set up by the whole corporation who constituted the trustees, and not, as in this case, by one individual member of it only. With respect to the objection grounded on the alleged interference of the suit with the functions of the visitor, it

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(a) See *The Attorney-General v. Brazen-Nose College*, 8 Bligh, 377. N. S.

(b) 2 Russ. 407.

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was perfectly clear that a visitor had no authority to order a new distribution and apportionment of the charity revenues, which it was the object of the present information to obtain, and which it was competent to the Lord Chancellor, only by virtue of his general jurisdiction, as presiding over all the charitable foundations in the kingdom, and in no other character, to direct.

Jan. 29.

The LORD CHANCELLOR.

When this appeal was originally before me, it seemed to involve a question of so much importance and novelty as to justify me in directing it to be again argued by one counsel on each side; and having had the benefit of that second argument, I have now to state the result of the best attention which I have been able to bestow upon the case.

With respect to the 5000*l.* arising from the transaction between the master of the hospital and the officers of the barrack department, I felt disposed on the hearing of the motion in *June* 1831, to look upon that sum as being in the nature of a windfall, which the master might appropriate to his own use, without applying any portion of it to the benefit of the hospital. But having now had an opportunity of more deliberately examining and considering the facts, I have come to the conclusion that this sum must be treated as forming part of the *corpus* of the charity estate; but that the master will nevertheless be entitled to enjoy his share of the annual profits of it, so long as he continues to fill the office of master. Without going further into the argument upon that point, I think it sufficient to observe that I entirely concur in what
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seems to have been the view upon which this part of his Honor's judgment proceeded: for inasmuch as the buildings were erected on land belonging to the hospital, and, but for the arrangement made with the barrack office, must themselves eventually have become the property of the hospital, and in that case might have proved greatly more valuable than the sum that has been received in lieu of them, the master, when he took upon himself to enter into the arrangement, must necessarily be presumed to have been dealing in his official capacity, and as a trustee for the hospital; and whatever sum, therefore, he may have realised by means of such dealing must be considered as a trust fund for which he is accountable to the charity estate.

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But the other and more important question remains to be disposed of, and upon that I have the misfortune to differ with his Honor; I mean the question with respect to the construction of the deed of endowment, and the right claimed by the almsmen under it, to participate proportionally with the master in the increased income of the charity.

The letters patent of the 8th *James* I. constitute the instrument which may be treated as the governing charter of this foundation. The intention of the endowment is stated in those letters to be for the relief and sustentation of the college or hospital, and of the master and poor to be and be maintained in the same; and the endowment then goes on to execute this intention in the following manner:—There is to be a college or hospital for ever, consisting of one master and five paupers; there is to be a master of the hospital, and of the goods and lands thereof; and there are to be five paupers supported, relieved, and maintained in the hospital; and then the endow-

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ment, repeating the same words, states how they are to be supported, thus ;—for their support, relief, and maintenance, they are to have and receive each of them through the hands of the master 52s. a year, to be paid by the said master at the four usual feasts. And the master and paupers are incorporated by the name of “The Master and Poor of the College or Hospital of King *James*.” And after giving power to make bye-laws, with the assent of the Attorney-General and Solicitor-General, for the order and disposition of the charity estate, the letters conclude by directing that the whole of the estate shall go to the support of the master and poor, and the maintaining and repairing of the houses and possessions of the hospital, and not otherwise.

There being then no dispute that the whole is given to the charity, the question is whether the estate is given to the body, consisting of the master and almsmen, subject to a yearly payment of 52s. to the almsmen, or to the master and almsmen; in other words, whether the surplus shall go to the master, whose share is not fixed, or between him and the almsmen, notwithstanding that there appears an intent to fix and limit the shares of those almsmen.

Let us first ask (as it is always right to do where no fixed rule of law prevails) what is the plain and natural sense of such a gift. If I give the whole of an estate, and other funds, to several objects, and mention the proportions in which each shall take, no difficulty arises; they are to divide the whole in those proportions. So, if without expressly stating that it shall be so divided, I so frame the gift that no reasonable doubt can be entertained of such being my intention, it is the same thing. One most important indication of this intention

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is, when particular amounts are given to the different objects, and the whole shares taken together exhaust the fund. This is, in fact, the *Thetford School Case* (a), supposing the gift there had been directly to the objects of the donor's bounty and no feoffees had been interposed; for, as that case stands, a question in later times might have arisen as to a resulting trust. This, at least, was Lord *Hardwicke's*, and appears to have been Lord *Eldon's* opinion. But suppose the gift to be framed quite otherwise, and instead of expressly apportioning the whole, or impliedly apportioning it, as by exhaustion or other indication of such an intention, the fund is given entirely to one body, subject to a certain payment to other parties, the latter can only take what is given, as a charge, and the surplus must go to the donee of the fund, unless there be circumstances clearly indicating a contrary intention. Nor is there any particular form in which alone the one object of the donor's bounty can be made the primary or principal donee, and the other only the secondary donee, or, as it were, the incumbrancer upon the fund. If the gift is of the whole estate or fund to one, and another is to receive so much a year out of its rents and profits, that clearly gives the surplus to the first. Then if the gift is to both, but so as one shall take yearly so much, is not this, in substance and effect, the same thing? The whole is given to both, not in fixed proportions, but with a certain amount to the one and the unascertained residue to the other. It is distributed, and their shares are ascertained, not by division but subtraction. Now, if you examine all the cases, both those to which I shall presently refer more particularly, and the others which are well known, the cases of *Attorney-General v. Johnson* (b), *Attorney-General v. Sparks* (c), *Attorney-General*

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(a) 8 Co. Rep. 130.

(c) Amb. 201.

(b) Amb. 190.

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neral v. The Mayor of Coventry (a), and Attorney-General v. Haberdashers' Company (b), you will find nothing that militates against this plain and natural construction, but much that supports it. Yet the case I have put is in substance the case at bar; for the intention of the gift is for the relief and sustentation of the master and poor; and that intention is executed by erecting a college or hospital for the master and five paupers; the master to be master of the hospital, and of the goods, chattels, and lands, &c., thereof (which distinction further aids the argument on his behalf), and the five paupers to receive for their support, relief, and maintenance, 52s. each, through the hands of the master; and the funds are to go to the support of the master and paupers, and for repairs, and not otherwise. This certainly is, at the least, a gift of the whole to the master and paupers; the amount receivable by the latter being ascertained, that receivable by the former unascertained; in other words, the surplus being the master's, after paying the paupers and providing for the repairs. It is clear that there is no middle course between this construction and one which would give the paupers first their fixed payment of so much a year, and then their share of the residue also.

The importance of the question not only in itself but in its possible consequences, as well as the circumstance of my having the misfortune to differ with his Honor in the opinion which I have formed, induces me further to consider the authorities that are supposed to bear upon the subject. An examination of these tends greatly, I think, to confirm the view which I take.

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(a) 2 *Vern.* 397., and 7 *Bro.* P. C. 235. *Toml.* ed. (b) 4 *Bro. C. C.* 103.

The *Thetford School Case* (a) proceeded upon grounds which are very material to be considered here. That was a devise of land to trustees for the maintenance of a preacher four days a year, a master and usher of a school, and certain poor; and certain sums were given to each, that is, to the preacher, master, usher, and poor, to the amount in all of 35*l.*, which formed the whole of the rents and profits of the land devised. The first consideration of the Court, therefore, was that the whole being given to the objects of the donor's bounty, the increase of the rents and profits should be divided among them for that reason; and that the fixed payments specified should not limit the amount of the shares, though they might ascertain the proportions in which those shares were to be received by the different objects. The circumstance which raised this argument is not to be found in the present case; for here to one only of the objects, the almsmen, a sum is fixed, and the donor contemplates a surplus over that, and disposes not of it. But the other, and according to the report the principal reason for increasing the shares in that case, applies to increasing the master's share here, though, certainly, not the shares of the five paupers.

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Lord *Coke* says, "This resolution is grounded on evident and apparent reason; for, as if the lands had decreased in value, the preacher, schoolmaster, &c. and poor people should lose, so when the lands increase in value *pari ratione* they shall gain." How is it here? If the rents fall down to 13*l.*, the paupers are to have the whole, and the master nothing. Therefore, by the argument in the *Thetford School Case*, the latter is entitled to the surplus, if any. Lord *Eldon* doubts if this be a sound principle; but he admits that the
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(a) 8 *Co. Rep.* 130.

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case in *Coke* has settled it as law, and that it cannot be disturbed. In *The Attorney-General v. The Mayor of Bristol* (a), his Lordship, after stating that no case has gone so far as to say that if a gift of lands takes notice of a portion of the rents allotted to a charitable use being less than the whole rents, the charity is entitled to the surplus, refers to the case of *Arnold v. Attorney-General* (b), as shewing that a gift to *A. B.* for charitable purposes, and then of sums to charities, but not amounting to the whole rents, makes *A. B.* a trustee of the surplus for charitable purposes, to be ascertained by sign manual or by this Court; and he puts the case of *A. B.* being a charitable corporation, and asks, "might it not be argued that the gift of the lands, and certain payments out of it, would make good the recital, because one charity would take in the shape of lands, and another in the shape of a pecuniary payment?" I need hardly remark how very nearly the case put by Lord *Eldon* approaches the present; indeed it is not distinguishable from it in principle. There can be no doubt that the opinion intimated in the words I have just read, must have extended to the view I am taking of this case, and that Lord *Eldon* would, upon the same ground, have thus disposed of it.

But the whole of the case of *The Attorney-General v. The Mayor of Bristol* is deserving of the greatest attention in disposing of the present question. In that case there was a gift of money to the corporation of *Bristol*, and a covenant by that corporation, which is in effect a declaration of trust, to purchase lands therewith, and out of the rents to pay certain sums to different corporate bodies in rotation, *Bristol* itself being one; and the question was, whether the corporation was a trustee of

(a) 2 J. & W. 294.

(b) *Show. P. C.* 22.

of the surplus rents for those bodies. Lord *Eldon* delivered a most elaborate judgment, elaborate not only as regarded the particulars of the case itself, into every detail of which he went very minutely, but also as regarded the other cases, leaving one nothing to regret except that by some accident he had not looked at Lord *Coke's* report of the leading case, the *Thetford School Case*. Yet even in dealing with the imperfect report in *Duke* on which his observations are grounded (and the imperfection relates only to an *obiter dictum*), he seizes with his wonted sagacity upon the error, for the difference of opinion (which he expresses in the form of a query or doubt) clearly applies to that portion of the case in which there is a discrepancy between the two reports. The whole of his reasoning and remarks are important in their bearing upon the present question, and his decision appears to me distinctly to support the view which I am now taking. He held that the corporation of *Bristol* was not a trustee of the surplus rents for the other corporations; upon the ground that *Bristol* was itself a material and prominent object of the donor's bounty, and that the case fell within the range of those cases in which property is given to a corporate body, subject only to the charges imposed. Whoever reads the *Bristol Case* attentively, will perceive that there were several matters in it opposed to this construction which exist not in the present case, and which nevertheless the Court got over.

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I shall now take notice of a passage in the *Thetford School Case*, which has more than once been commented on in questions of this kind, and has been referred to upon the present occasion. In Lord *Coke's* report of that case it is said, "The case concerned the colleges in the universities of *Cambridge* and *Oxford* and other colleges, &c. For in ancient time, when lands were of small yearly value (victuals then being cheap), and were

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given for the maintenance of poor scholars, &c., and that every scholar, &c. should have a penny or three half-pence a day, that then such small allowance was competent in respect of the price of victuals and the yearly value of the land; and now the price of victuals being increased, and with them the annual value of the lands, it would be injurious to allow a poor scholar a penny or three half pence a day, which cannot keep him, and to convert the residue to private uses, where in right the whole ought to be employed to the maintenance or increase (if it may be) of such works of piety and charity which the founder has expressed, and nothing to any private use; for every college is seised *in jure collegii*; *scilicet*, to the intent that the members of the college, according to the intent of the founder, should take the benefit, and that nothing should be converted to private uses." The question in that case was between the objects of the charity, namely, the preacher, master, usher, and poor of the school, and the devisees. But the case of the colleges put by the Judges, as stated in *Duke*, seems somewhat different from the case as stated by Lord *Coke* himself, and is as if a right were given to the scholars against the college. This at least appears to have struck Lord *Eldon* as one interpretation of the passage; for in *The Attorney-General v. The Mayor of Bristol* his Lordship says, "If the text is to be understood thus, that where property has been given for the foundation of a college, and a distribution has been at the same time made of all the rents to given members of that college, there must be an increase, as the times require, for all those persons; of that there can be no doubt." (a) But his Lordship adds, "unless I am mistaken, there are many cases to be found in both the universities where land has been given of a greater value than the amount of the charges (which

(a) 2 J. & W. 517.

(which have been for scholars, exhibitioners, and so on) upon that land, and where in point of fact the enjoyment has been this ; — the charges have been made good from time to time, and the surplus has been taken by the college itself ;” and further, “ I believe that if this were considered an improper application of their funds it would have the effect of disturbing the distribution of the revenues of many of the colleges in both universities.” The report he cites is that of *Duke (a)* ; and the fuller one in *Lord Coke* makes it much more doubtful if any thing more was meant than that the whole gift should go for public and collegiate purposes, private uses being repeatedly put in contrast with them, three times in *Lord Coke*, and once in *Duke*. But there is a much more material difference between the two reports. That in *Duke* apparently puts the case of lands given not to the poor scholars, but to the college and scholars ; — “ The resolution did concern all the colleges, &c. ; for when the lands were first given for their maintenance, and that every scholar should have three half-pence a day,” &c. In *Lord Coke’s* report the expression is, ‘ land given for the scholars ;’ — “ When lands were given for the maintenance of poor scholars, &c., and that every scholar should have a penny or three half-pence a day.” It is plainly a very different thing to say that a gift of lands or the rent of lands to maintain poor scholars, each having so much a day, is a gift to them of the whole, and entitles them to the surplus ; and to say that a gift of land to a college for its maintenance, and that each scholar should have so much, entitles the scholar to a share of the surplus *ultra* the fixed sum. The former is in truth exactly the *Thetford School Case* ; the latter is a case not to be found decided either

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either in that or in any other case. The former is the plain and definite proposition, that a gift of the whole fund in fixed proportions to the different objects of charity, vests the whole in those objects in such proportions, to the exclusion of the trustees through whose instrumentality the charitable purpose is to be effected; the latter is the position not to be maintained in argument, and for which certainly no authority can be cited, that a gift of a fund to certain parties, all alike objects of the charity, and specifying what some shall take without mentioning the others in this respect, or establishing any proportion among them, entitles those whose shares are fixed to a share also of the residue. Had the words of Lord *Coke's* report been accurately attended to, it never could have been supposed that this doctrine derived any countenance from that report. But I may further observe, that even had it been as in *Duke*, and as commented on and indeed dissented from by Lord *Eldon*, it is no decision; it is only an *obiter dictum* touching the possible bearing of the resolution in the case. The principal case itself of the *Thetford School* most clearly affords no countenance whatever to the doctrine.

It remains to consider whether there be any other circumstances connected with the present case which entitle us to give a different construction to the grant. To speculate upon intentions which may be supposed to exist respecting the paupers, inconsistent with the precise and defined purpose intimated as to them in their relation to the master or the body of which they form a part, would be extremely unsafe, and could indeed lead to no satisfactory result. Such topics on the one hand are met and balanced by others of at least equal force and pertinency, such as the station and functions of the master both in the hospital and  
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in the church. But there is one particular which deserves much more attention, and appears to have greatly weighed with the Court below, — the power given to the Master to make bye-laws, with the assent of the Attorney-General and Solicitor-General, for the ordering and disposing of the charity estates. I am of opinion, however, that this does not alter the position in which the case is left upon the construction of the rest of the instrument; first, because I take it that in making such regulations it must always be understood that they shall not be inconsistent with the body of the rules laid down originally in the governing charter, the letters patent themselves; but next, and principally, because no such disposition as it is contended ought now to be made of the revenues has ever been made under the power referred to; and therefore the question is, whether or not the parties can now be compelled to make it, or the Court can make it for them. They can only be compelled if it be according to the intention of the donor. They would only be justified in making it, uncompelled, if the donor's provisions allowed them; but they could only be called upon by the Court to make it, if those provisions required them to do so. It therefore seems to me that this view of the question brings us back to the one first taken, and upon which the whole turns.

It is impossible in cases of this description to lay out of view the length of time during which a certain arrangement has subsisted, and a certain meaning has been given in practice to the instrument of foundation. If, indeed, the practice (though of centuries) has been a breach of trust, doubtless the lapse of time shall be no bar. But long adverse enjoyment is not to be thrown out of view in seeking for the true construction of the provisions under which both conflicting parties claim;

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claim; and a principle of distribution under a known instrument of foundation, if long acquiesced in by all the objects of the bounty from whence the funds proceed, and to effectuate the purposes of which the instrument is framed, ought not without manifest reason to be disturbed. The rule of interpretation from contemporaneous usage and long acquiescence extends over every branch of the law, independently of its connection with matter of limitation and bar. I speak not now of a course of dealing with charitable funds in the absence of evidence respecting the original endowment, or in plain opposition to its provisions. But where the endowment is forthcoming, its construction may be aided by adverting to the long and uninterrupted acting under it, and acquiescence in that acting.

It may be added, that in all such cases of contest between the different objects of the founder's bounty, the proof seems reasonably and naturally to rest on the party setting up a fixed and restricted portion as alone due to his companions in the charity, and claiming the surplus for himself. Exclusion may not be presumed even from usage; but the usage may be a confirmation of the evidence which the instrument affords that the exclusion was intended.

I am therefore of opinion, that so much of this decree as declares that the almsmen of the hospital are entitled to share rateably with the master in the increased revenues of the charity cannot be supported, and ought to be reversed.

**T**HE decisions of the Court below in the following cases were brought by appeal before the Lord Chancellor, by whom they were severally affirmed; *viz.* : —

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|---------------------------------------------------------|-----------------------|
| BREASHUR <i>v.</i> DOR, (reported in 4 <i>Sim.</i> 21.) | <i>Feb.</i> 16. 1851. |
| GREENWOOD <i>v.</i> ATKINSON, (4 <i>Sim.</i> 54.)       | <i>March</i> 4. —     |
| BARRAUD <i>v.</i> ARCHER, (2 <i>Sim.</i> 433.)          | <i>May</i> 9. —       |
| SMITH <i>v.</i> FITZGERALD, (3 <i>V. &amp; B.</i> 2.)   | <i>Aug.</i> 8. —      |
| EALES <i>v.</i> CONN, (4 <i>Sim.</i> 65.)               | <i>Aug.</i> 8. —      |
| GRINNELL <i>v.</i> CORBOLD, (4 <i>Sim.</i> 546.)        | <i>Aug.</i> 22. —     |
| LLOYD <i>v.</i> LORD TRIMLESTOWN, (4 <i>Sim.</i> 296.)  | <i>Aug.</i> 23. —     |
| Earl of NEWBURGH <i>v.</i> EYRE, (4 <i>Russ.</i> 454.)  | <i>Aug.</i> 25. —     |

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**T**HE judgments in the following cases, reported in this and the former volume of *Russell & Mylne's Reports*, have been carried by appeal to the House of Lords, and there affirmed, *viz.* ; —

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| PRITCHARD <i>v.</i> DRAPER, (vol. i. 191.)    |
| COCKERELL <i>v.</i> CHOLMELEY, (vol. i. 418.) |
| CAMPBELL <i>v.</i> GRAHAM, (vol. i. 453.)     |
| SALWAY <i>v.</i> SALWAY, (vol. ii. 215.)      |
| CAMPBELL <i>v.</i> HARDING, (vol. ii. 390.)   |



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See RECEIVER.

### BARON AND FEME.

1. A married woman, to whom a rent-charge for life in reversion is devised to her separate use, without the intervention of trustees, joins with her husband in assigning it for a valuable consideration: she is bound by that assignment after the death of her husband. *Major v. Lansley.* 355
2. The contingent reversionary interest of the wife in the trust of a term for years may be sold by the husband; and the wife surviving will be bound by such sale, though the husband dies before the contingency is determined or the reversion falls into possession. *Donne v. Hart.* 360

See ANTICIPATION, 1.

MARRIAGE SETTLEMENT.

PLEADING, 1.

SEPARATE ESTATE, 1, 2.  
SETTLEMENT.

### BIDDINGS, OPENING OF.

Biddings opened on an advance of 500*l.* upon 13,500*l.* under the circumstances. *Cochrane v. Cochrane.* Page 684

### BILL OF EXCHANGE.

In a suit to recover the amount of a lost bill of exchange, the loss of the bill being proved at the hearing, the defendant, if he disputes the sufficiency of an indemnity which has been offered to him, and the Master finds in favour of the indemnity, will be ordered to pay the costs subsequent to the original hearing. *Macartney v. Graham.* 353

### BOUNDARIES.

See COMMISSION TO ASCERTAIN BOUNDARIES.

### BREACH OF TRUST.

See POWER, 2.

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### CHARITABLE USE.

1. A judgment debt due to a testator, which in his lifetime had been reported in a creditor's suit to be an incumbrance affecting the real estate of the debtor, will not pass by his will to a charitable use, being within the statute of the 9 G. 2. c. 36. *Collinson v. Pater.* 344
2. Re-

2. Reference to settle a scheme for the application of the revenues of an ancient hospital, of which the original foundation and endowment are unknown, but of which the master, after paying a certain fixed yearly stipend to a chaplain, and also to six almswomen who had apartments in the hospital, and defraying the repairs, applied the surplus income to his own use.

*Attorney General v. The Archbishop of York.*

Page 461

3. By letters patent of King *James I.* a charitable corporation was created by the name of the Master and Poor of the College or Hospital of King *James*, in the suburbs of *Colchester*, to consist of a master and five poor persons; and lands were granted to the corporation, with a direction that 52s. yearly should be paid to each of the five poor persons for their support and maintenance: and it was ordained that the income and revenues of the lands so granted should be expended for the support of the master and poor of the hospital, and for the maintenance and repairs of the buildings and possessions of the hospital. Under the particular provisions of the letters patent, it was held, at the Rolls, that the five poor persons were entitled to share with the master in the increased revenue of the charity lands; but this decision was reversed on appeal.

The master having, in virtue of an agreement with the comptroller of the Barrack Office, derived a

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profit upon the sale of the materials of certain barracks which under a lease from the master had been erected on part of the charity lands; it was held, that inasmuch as this agreement, so far as the master was a party to it, grew out of and was incidental to his official situation, the profit was not personal to the master, but was received by him in trust for the charity.

*Attorney-General v. Smythies.*

Page 717

## CHARGE.

See WILL, 11. 13.

## CHILDREN.

See SETTLEMENT.

## CODICIL.

See WILL, 12.

## COLLEGE.

See FELLOWSHIP.

## COMMISSION TO ASCERTAIN BOUNDARIES.

In order to sustain a bill for a commission to ascertain boundaries, the Plaintiff must establish, by the admission of the Defendant, or by evidence, a clear legal title to some land in the possession of the Defendant, and also a ground for equitable relief; and where the quantity of the land of the Plaintiff, in the possession of the Defendant, is doubtful upon the evidence, the Court will direct a commission or an issue, as

3 D

will

will best answer the justice of the case. *Godfrey v. Littell*.

Page 630

## COMMITTEE OF ESTATES.

*See* LUNATIC.

## COMMITMENT.

*See* CONTEMPT, 1, 2.

## CONSENT.

*See* PRIVATE HEARING.

## CONSIGNEE.

*See* TRUST DEED, 2.

## CONTEMPT.

1. An order that a Defendant in contempt for breach of an injunction shall stand committed, unless cause be shewn on a stated day, is not irregular if it be personally served. *Durant v. Moore*.

33

2. Privilege of parliament is no protection against an attachment for any contempt which is of a criminal and not of a civil kind.

The clandestine removal of a ward of Court from the custody of the person with whom such ward has been residing under the authority of the Court, is in its nature a criminal contempt.

A member of the House of Commons, who had carried off his infant daughter, a ward of the Court, from the house of the ladies under whose care she had been placed by the guardians appointed by the Court, and who

on being personally examined by the Court admitted the fact, and refused to state the present residence of his daughter, was ordered to be committed to the *Fleet*, although he was not a party to the suit. *Wellesley v. The Duke of Beaufort*. Page 639

3. A person writing a letter to the Lord Chancellor, relative to a threatened suit, and inclosing a bank note, was held guilty of a contempt, and ordered to attend personally and shew cause why he should not be committed; but afterwards, on his appearing and expressing contrition, he was discharged on payment of costs. *Martin's Case*. 674

## CONSTRUCTION.

*See* CHARITABLE USE, 3.

INSOLVENT DEBTORS' ACTS.  
FELLOWSHIP.

POWER, 1, 2.

PRACTICE, 1, 2.

STATUTES, 1.

SEPARATE ESTATE, 1, 2.

WILL.

## CONVERSION.

*See* WILL, 5, 6.

## CONVEYANCE.

*See* INFANT HEIR.

STATUTES, 1.

## COPYHOLD.

*See* LORD OF A MANOR.

## CORPORATION.

*See* INJUNCTION, 2.

COSTS.

**COSTS.**

1. Where a bill is filed to set aside a will, and, upon an issue directed by the Court, the verdict of the jury is in favour of the will, and a new trial is refused, the bill will be dismissed without costs, unless the validity of the will could have been tried by ejectment. *Tatham v. Wright*. Page 31
2. Costs, as between solicitor and client, will be allowed to the Plaintiff in a creditor's suit, where there is a deficient fund. *Hood v. Wilson*. 687

See BILL OF EXCHANGE.

DEPOSIT.

FORECLOSURE SUIT.

INJUNCTION, 1. 3.

SPECIFIC PERFORMANCE.

**COVENANT.**

See WILL, 14.

**COVERTURE.**

See ANTICIPATION, 1.  
WILL, 4.

**CREDITORS.**

See EXECUTOR.

PARTNERSHIP.

TRUST DEED, 1.

**CREDITORS' SUIT.**

See COSTS, 2.

**DEATH WITHOUT ISSUE.**

See WILL, 8, 9, 10. 13.

**DEBTS.**

See WILL, 11.

**DECLARATIONS.**

See PEDIGREE.

**DEPOSIT.**

The deposit on an appeal is merely a security for costs; and, therefore, where an appeal is dismissed without costs, the deposit will be returned, unless the Court makes special order to the contrary. *Dell v. Barlow*. Page 686

**DISCOVERY.**

See ANNUITY.

**DISSOLUTION OF PARTNERSHIP.**

See ACCOUNT.

**DIVORCE.**

See FRAUD.

**DOUBLE PROVISIONS.**

See PORTIONS.

**ELECTION.**

See WILL, 7.

**ENGRAVINGS.**

See INJUNCTION, 1.

**EQUITABLE TITLE.**

See TRUST.



**EVIDENCE.**

See **ILLEGITIMATE CHILD**, 1.

**PEDIGREE.**

**PORTIONS**, 1, 2.

**WILL**, 16, 17, 18.

**EXAMINATION.**

See **FELLOWSHIP**.

**EXECUTOR.**

After a decree in a suit for the administration of assets, an executor is not at liberty to do any act which affects the relative rights of creditors. *Shewen v. Vanderhorst*.  
Page 75

**FELLOWSHIP.**

1. A person who endows a close fellowship in a college comprising other fellowships of an older foundation, will be presumed to be generally cognisant of the statutes and rules of the college, and to mean that his fellow shall be subject to the same provisions with respect to election and admission as the other fellows, except in so far as those provisions are controlled by the express terms of the endowment.

Where, therefore, out of several candidates for a close fellowship, only one fulfilled all the conditions required by the endowment, that circumstance was held not to exempt him from the necessity of undergoing the usual college examination, to prove his

fitness for the fellowship. But the standard of merit set up on the examination of such a candidate should be not relative, but positive; merely ascertaining that he is duly qualified, and having no regard to the comparative qualifications of his competitors. *Ex parte Inge, In the Matter of Catharine Hall*. Page 590

2. Under a deed of endowment, directing that the master and fellows of a college shall elect into the fellowship thereby created and annexed to the college a native of a particular town, "if any such shall be found able within the University," the master and fellows may examine a candidate for such a fellowship, who is duly qualified by birth, with a view to ascertain that he is "able;" and, if he is not found "able," may elect another candidate, who, without the qualification of birth, possesses the requisite "ability." *Ex parte \*\*\*\*, In the Matter of St. John's College, Cambridge*. 603

**FEME SOLE.**

See **ANTICIPATION**.

**WILL**, 4.

**FORECLOSURE SUIT.**

In a foreclosure suit to which the provisional assignee of the Insolvent Debtors' Court is made a party, as representing the owners of the equity of redemption, the costs of the provisional assignee will be ordered to be paid by the Plaintiff, who will add them, along with

with his own costs, to the sum due on the mortgage. *Peake v. Gibbon*. Page 354

**FOREIGN DIVORCE.**

See FRAUD.

**FRAUD.**

Where a person agrees to give up his claim to property, in favour of another, such renunciation will not be supported, if, at the time of making it, he was ignorant of his legal rights, and of the value of the property renounced; especially if the party with whom he dealt possessed and kept back from him better information on the subject.

A sentence of divorce pronounced by a foreign court cannot defeat the rights acquired by parties under a marriage solemnised in *England*. *M'Carthy v. Decaix*. 614

See ANNUITY.

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**HEIR AT LAW.**

See NEW TRIAL.

**HOSPITAL.**

See CHARITABLE USE, 2, 3.

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**ILLEGITIMATE CHILD.**

1. A testatrix gave a share of her residuary estate to the children of *Mary Gladman* deceased. *Mary*

*Gladman* left two children, one legitimate, the other illegitimate. Evidence was admitted to prove that the illegitimate child had acquired the reputation of being the child of *Mary Gladman*; that the testatrix well knew that fact, and that *Mary Gladman* left only those two children. *Gill v. Shelley*. Page 336

2. Where a legacy is given to a natural child, with directions to apply the interest for his maintenance, the interest is payable from the death of the testator. *Dowling v. Tyrell*. 343

**INDEMNITY.**

See BILL OF EXCHANGE.

**INFANT HEIR.**

The testator devised his estate to two tenants in common in fee; one died after the testator, leaving an infant heir. In a creditor's suit, after a decree for sale of the estate, the infant heir was ordered to join in the conveyance to the purchaser, under the 1 *W.4. c. 47. s. 11*. *Brook v. Smith*. 73

**INFANT WARD.**

See SEPARATE ESTATE, 3.

**INJUNCTION.**

1. In a suit to restrain the sale of pirated copies of a print, where the answer did not suggest that the prints complained of were not pirated copies, a decree was made under the particular circumstances, though the prints, which had been

exhibited to the witness who proved the offence, were not produced at the hearing.

Where the Plaintiff is entitled to have the injunction made perpetual, the Defendant will have to pay the costs of the suit, however trivial the subject-matter of the suit may be, if he did not, after the injunction was granted, tender the costs up to that time.

*Fradella v. Weller.* Page 247

2. Injunction to restrain the Grand Junction Water Works Company from applying to parliament for an act authorising the company to procure its supply of water by means of an aqueduct from the river *Colne* instead of the *Thames*, as authorised by the existing acts under which it was incorporated, refused.

A court of equity will not, at the instance of a shareholder, restrain a joint stock company incorporated by acts of parliament which prescribe its constitution and objects, from applying in its corporate capacity to parliament, and from using its corporate seal and resources to obtain the sanction of the legislature to the remodelling of its constitution, or to a material alteration and extension of its object and powers.

The right of making such an application is incident to a joint stock company of that description.

*Ware v. The Grand Junction Water Works Company.* 470

3. Where Defendants, who had been imprisoned under an attachment

which was afterwards set aside for irregularity, commenced actions against the Plaintiffs to recover damages for false imprisonment, the Court stayed the actions, on the terms of the Plaintiffs paying to the Defendants their costs at law, and of the application to stay, and directed a reference with respect to a proper compensation for the injury which the Defendants had suffered. *Phillips v. Worth.* Page 638

See CONTEMPT, 1.

## INSOLVENT DEBTORS' ACTS.

Under the Insolvent Debtors' Acts the insolvent is discharged with respect to debts due from him only to the extent of the sums stated by him in his schedule.

*Barton v. Tattersall.* 541

## INTEREST.

See ILLEGITIMATE CHILD, 2.

## INTERPLEADER.

Where goods in the hands of a bailee have been subsequently so treated and dealt with by the bailor as to constitute or acknowledge an apparent title to them in two distinct parties, the rule which prevents an agent from filing a bill of interpleader against his principal does not apply. *Pearson v. Cardon.* 606

## ISSUE.

See PEDIGREE, 1.

## ISSUE DEVISAVIT VEL NON.

See NEW TRIAL.

## JOINT

**JOINT STOCK COMPANY.**

*See* INJUNCTION, 2.

**JUDGMENT DEBT.**

*See* CHARITABLE USE, 1.

**JURISDICTION.**

*See* ANNUITY.  
PARTIES.

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**LEGACY.**

*See* ILLEGITIMATE CHILD, 2.  
WILL, 17, 18.

**LENGTH OF TIME.**

*See* TRUST.

**LIABILITY OF PARTNERS.**

*See* PARTNERSHIP.

**LIABILITY OF TRUSTEES.**

Trustees and executors who, for upwards of a year after their testator's death, allowed a considerable portion of the assets to lie unproductive in the hands of a banker who failed, were, under the circumstances, charged with the loss. *Moyle v. Moyle*. Page 710

*See* RECEIVER.

**LIABILITY TO DEBTS.**

*See* WILL, 11.

**LIMITATIONS.**

*See* WILL, 13.

**LOCO PARENTIS.**

*See* PORTIONS, 2.

**LORD OF A MANOR.**

Where a lord of a manor admits a tenant upon the trusts of an indenture referred to in the surrender, he is to be considered as consenting to those trusts, and is bound by them upon the death of the trustee without an heir.

*A.* being seised of a copyhold in fee, surrendered it to the use of *B.* and his heirs, according to the custom of the manor, but subject to the trusts of a certain indenture therein referred to; these trusts were, after giving one year's previous notice, to sell the tenement, to retain out of the proceeds of the sale a sum of 700*l.* and interest, for which the surrender was a security, and to pay the overplus to *A.*; *B.* was admitted, and died intestate and without an heir, the 700*l.*, with an arrear of interest, still remaining due to him:

Held, that the lord did not become entitled to the tenement by reason of failure of heirs of *B.*, and that *A.* had a right to redeem the premises, and, upon payment of what was due on the mortgage, to be readmitted as tenant in fee according to the custom of the manor:

That it was the personal representative of *B.*, and not the lord, who was entitled to receive the mortgage debt. *Weaver v. Maule*.

Page 97

## LOST BILL.

See BILL OF EXCHANGE.

## LUNATIC.

In a case where a lunatic had two estates situate at a distance from each other, and of considerable value, the Court, under the circumstances, appointed a separate committee for each. *In re Robins.* Page 449

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## MAINTENANCE.

See ILLEGITIMATE CHILD, 2.

## MARRIAGE.

See FRAUD.

## MARRIAGE SETTLEMENT.

After the marriage of a female ward a settlement is made, under the direction of the Court, for the benefit of the wife and children of the marriage, of a moiety of a plantation in *Demerara*, of which the wife was seised in fee at the time of the marriage; the husband and wife afterwards mortgage the estate to persons having full notice of the settlement; by the law of *Demerara* the settlement was a nullity, and in no manner affected the rights and powers of the husband and wife over the estate:—Held, that the mortgage is valid, inasmuch as the equity of the wife and children attaches only upon the person of

the husband, and not upon the estate. *Martin v. Martin.*

Page 507

## MEMBER OF PARLIAMENT.

See CONTEMPT, 2.

## MODUS.

A modus payable by every householder, in lieu of all tithes of hay, without regard to the fact whether such householder has or has not hay, is valid, but otherwise if it be alleged to be payable only when the householder has hay.

Sixpence in lieu of a tithe pig is rank: a modus for fruit and garden-stuff is good, though it be not alleged to be growing in a garden. *Gronow v. Edwards.*

102

## MONUMENTAL INSCRIPTIONS.

See PEDIGREE, 2.

## MORTGAGE.

A mortgagee who has taken the body of his debtor in execution for the mortgage debt, is nevertheless entitled to the benefit of his mortgage security. *Davis v. Battine.*

76

See FORECLOSURE SUIT.

LORD OF A MANOR.

MARRIAGE.

WILL, 11.

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## NE EXEAT REGNO.

A writ of *ne exeat regno* will not be granted to a Plaintiff resident in a foreign

foreign country. *Smith v. Netherlands.* Page 450

### NEW TRIAL.

A motion for a new trial of two issues, was made upon three grounds: 1st, the alleged improper summing up of the judge; 2dly, because the weight of evidence was against the verdict; and, 3dly, because only one of the attesting witnesses was examined at the trial. The motion was refused on the ground, that, upon the evidence alone, without regard to the summing up of the judge, the Court would not have been satisfied, if the jury had given a different verdict; and because the two attesting witnesses, who were not examined, were present in court on the trial of the issue, and tendered to the party moving for a new trial, who declined to examine them.

*Semble*, the rule is not universal, that, on the trial of an issue *devisavit vel non*, all the attesting witnesses must be examined at law.

*Semble*, that rule does not apply, where the bill is filed by the heir-at-law, to restrain the devisee from setting up a legal estate as a bar to the ejectment. *Tatham v. Wright.* 1

### NOTICE.

*See* TRUST.

VENDOR AND PURCHASER.

### OBLIGATION TO SETTLE.

*See* PERFORMANCE.

### OPENING BIDDINGS.

*See* BIDDINGS.

### ORDERS.

*See* DEPOSIT.

### PARLIAMENT.

*See* INJUNCTION, 2.

CONTEMPT, 2.

### PARTIES.

Where the person, whose interests are sought to be affected by the decree, is out of the jurisdiction of the Court, the suit cannot proceed in his absence. *Browne v. Blount.* Page 83

*See* PLEADING, 2.

### PARTNERSHIP.

The creditor of a partnership, in which one of the partners dies, and the surviving partners afterwards become bankrupt, has a right to resort to the assets of the deceased partner for payment, without regard to the state of the account as between such deceased partner and the surviving partners. *Devaynes v. Noble.* 495

*See* ACCOUNT.

### PEDIGREE.

1. Where, in a pedigree case, the object is to connect *A.* with *C.*, after proving that *B.*, a deceased person, was related to *A.*, it is competent to give in evidence declarations

clarations by *B.*, in which he claimed relationship with *C.*

A paper in the handwriting of *B.*, found in his repositories at his death, and purporting to give a genealogical account of his family, of which it represents *C.* to have been a member, is admissible for the same purpose, though never made public in *B.*'s lifetime, though erroneous in various particulars, and professing to be founded chiefly on hearsay.

Nature and amount of the evidence, upon which the Court will direct an issue to investigate a title depending on a question of pedigree. *Monkton v. Attorney-General.* Page 147

2. *Semble*, that in a pedigree case statements contained in monumental inscriptions and hearsay declarations by a deceased relative, are admissible evidence to prove the respective ages of the persons to whom they refer, as well as the fact of their relationship to each other. *Kidney v. Cockburn.* 167

### PERFORMANCE.

Where a tenant for life sells part of the settled estate under the authority of an act of parliament which directs him to lay out the consideration money in the purchase of other lands, and to settle them to the same uses, and he afterwards purchases lands in fee simple, to nearly the amount, but dies without having settled them accordingly, leaving them to descend upon his heir-at-law, who

was also the first tenant in tail in remainder under the settlement, a court of equity will intend that the purchase was made in performance of the obligation imposed by the act, and will not permit the remainder-man to recover the value of the lands sold against the personal estate of the tenant for life. *Tubbs v. Broadwood.* Page 487

### PERPETUATION OF TESTIMONY.

See PRACTICE, 3.

### PIRACY.

See INJUNCTION, 1.

### PLEADING.

1. The bill of the husband and wife, where it seeks relief in favour of the husband to the prejudice of the wife's interest, is considered by the Court as the bill of the husband alone.

In such a case the proper course is to make the wife a defendant.

If there were no deed, and it was simply the case of a wife consenting that the husband should receive money which was given to her, then the wife's consent in Court would be sufficient without altering the form of the pleadings. *Hanrott v. Cadwallader.* 545

2. A person entitled to a share of a sum of money, which is due as a debt from a testator, cannot maintain a bill for his own share, unless

less he sues on behalf of himself and all other parties interested in the debt, or makes those other persons parties to the suit. *Alexander v. Mullins.* Page 568

### PORTIONS.

1. If a father makes a provision for a child by settlement on her marriage, and afterwards makes a provision for the same child by his will, it is *primâ facie* to be presumed that he does not mean a double provision.

But this presumption may be repelled or fortified by intrinsic evidence, from the nature of the two provisions, or by extrinsic evidence of the intentions of the testator at the time of making his will.

Slight differences between the two provisions will not repel the presumption against double provisions.

Slight differences are such as, in the opinion of the Judge, leave the two provisions substantially of the same nature.

Declarations of the parent referring to his intention at the time of making his will, whether made at the time or before or after, are admissible evidence to prove that he did not mean to give a double provision.

A paper written some time after the date of his will, and showing the state of his property, but having no reference to his intention, is not admissible for that purpose.

A father, by articles made previous to the marriage of his daughter, agreed to settle, either by deed or will, lands of the value of 3000*l.*, in trust for his daughter for life, to her separate use, remainder to the husband for life, remainder to the children of the marriage as tenants in common in tail, with cross remainders. By his will he devised a real estate worth more than 3000*l.* in trust for his daughter for life to her separate use, but without the power of anticipation or alienation; remainder to the husband for life, he maintaining and educating the children of the marriage; remainder to the children of the marriage as tenants in common in fee; with a limitation over of the shares of those who should die under twenty-five without leaving issue, to the survivors: Held, that the differences between the two provisions were not such as to repel the presumption against double portions, and that the daughter, her husband, and children, were not entitled both to the benefits given by the will, and to the provisions stipulated for by the articles. *Weall v. Rice.*

Page 251

2. A testator who has contributed to the maintenance and education of a female infant, nearly related to him, from the time of her father's death, and who has been treated by her as the person whose consent was necessary to her marriage, and who has taken upon



upon himself the obligation to make a provision for her in that event, is, as to the question of a double provision by will and settlement, to be considered in *loco parentis*; and the presumption against a double provision, which would arise in the case of a father will apply to such a case.

In such a case parol evidence may be adduced to prove the intention against a double provision, as well as on the question whether the testator was in *loco parentis*.

*Quære*, Whether, if the testator was not to be considered in *loco parentis*, parol evidence of his intention not to make a double provision by will and settlement would be admissible?

It being proved by parol evidence that the testator intended the provision made by the settlement to be in lieu of a legacy given by the will, the settlement was held to be a satisfaction of the legacy, though the two provisions differed so much from each other that they could not be considered substantially the same.

The legacy was not set up by a codicil made after the settlement, ratifying and confirming the will, and all the devises and bequests therein contained. *Booker v. Allen*.

Page 270

3. A testator, by his will, reciting that he had on the marriage of two of his daughters, advanced and transferred for their respective benefit 500*l.* sterling and

900*l.* bank stock, bequeathed 500*l.* sterling and 900*l.* bank stock in trust for his remaining daughter *Francisca*, during her life, to her separate use, without power of anticipation or alienation; then for her children, subject to an exclusive power of appointment by her; and if there were no children in whom the fund should vest, for such person, &c. as she should appoint: *Francisca* afterwards married, and on her marriage her father advanced to her 500*l.*, and transferred to the trustees of her marriage settlement 900*l.* in bank stock, in trust for her separate use during her life; then for her husband during his life, and after his decease for the children of the marriage; but if she died in the lifetime of her husband, without leaving any child, then to her husband absolutely; and if he died in her lifetime, without leaving any child by her, to her absolutely: Held, that the provision made for *Francisca* on her marriage was an ademption of the legacies of 500*l.* and of 900*l.* bank stock. *Carver v. Bowles*.

Page 301

4. The testator, upon the marriage of a daughter, entered into a bond for the payment of 5000*l.* within six months after his decease to the trustees of his daughter's settlement, the interest to be paid to the husband for life; and after his decease, if the wife survived him, and there were children of the marriage, 1000*l.*, part of

of the 5000*l.*, to be paid to the wife, and the remainder to be applied to the use of the children of the marriage, but if there were no children, 2000*l.* to be paid to the wife, and the remainder of the 5000*l.* to be paid to the executors and administrators of the husband; and in case the husband survived the wife, and there were no children, then the whole of the 5000*l.* to the husband. The testator afterwards made his will, and gave his daughter 5000*l.*, stating it to be in addition to what he had secured upon her marriage. About five years afterwards the testator executed a deed, whereby he covenanted that his executors should pay to the trustees, within six months after his death, the sum of 5000*l.* upon the trusts of the settlement. Parol evidence of the declarations of the testator was admitted to prove that he did not intend a double portion.

*Quære*, Whether the different interests of the husband, wife, and children, in the legacy of 5000*l.*, and in the sum of 5000*l.* given by the deed, would repel the common presumption against double portion? *Lloyd v. Harvey*. Page 310

5. A testator, upon the marriage of a daughter, entered into a bond conditioned for the transfer to the trustees of her settlement during his life, or within twelve months after his decease, of 10,000*l.* 4 per cent. bank annuities: the only 4 per cent. bank annuities then existing were afterwards reduced

to 3½ per cents., but there was existing at the time of his death a new 4 per cent. stock, which had been created two years after the reduction of the old 4 per cents: — the bond is satisfied by a transfer of 10,000*l.* 3½ per cents.

The same testator by his will gave to a son a legacy of 2000*l.* in the joint stock of the 4 per cent. bank annuities, transferable at the Bank of England, commonly called “4 per cent. bank annuities:” the only 4 per cent. bank annuities existing at the date of his will were reduced to 3½ per cents. afterwards, and before his death a new stock of 4 per cent. bank annuities were created: — the will speaks at the testator’s death, and the son is entitled to a sum of 20,000*l.* in the then existing 4 per cent. bank annuities.

A testator by his will gave to his daughter Sophia and her children, under certain circumstances, a sum of 10,000*l.* 4 per cent. annuities, and directed that, with the exception of certain sums, of which this was not one, and which were expressly ordered to be brought into hotchpot, the legacies bequeathed to any of his children were to be not in satisfaction of, but in addition to any portion or provision to which they were or should be entitled under any articles or settlement then already executed by him; afterwards, upon her marriage, a sum of 10,000*l.* 4 per cent. bank annuities was settled upon Sophia, her husband, and

and her children :— she is not entitled to both provisions, notwithstanding the differences in the limitations.

The testator, on the marriage of another daughter without his consent, revoked a bequest of 10,000*l.* 4 per cent. bank annuities which he had made by the same will in favour of that daughter and her children, and gave her a life interest in a sum of 5000*l.* 4 per cent. bank annuities; he afterwards settled 10,000*l.* on her and her children, and by a codicil declared the settlement to be in satisfaction of the legacy : — this circumstance, even coupled with the difference of the provisions and the language of the will, is not sufficient to repel the presumption against double portions in the case of the daughter Sophia. *Sheffield v. The Earl of Coventry*.

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#### POWER.

1. Where there is no appointment under a power, and no gift over in default of appointment, those persons only will take who could take by appointment.

A testator gave the residue of his personal estate to his wife, for her own sole use and disposal, trusting that she would thereout provide for his family, and particularly his only son; and, at her decease, give and bequeath the same to her children by him, as she should appoint :

Held, that the wife could ap-

point only by will, and that children living at her death were alone entitled to share in an unappointed portion of the fund.

*Walsh v. Wallinger*. Page 78

2. Where, on marriage, a settlement is made of the wife's property to herself for life, to her separate use, with remainder as she should appoint by any writing signed by her and attested by two witnesses, and for default of appointment to the children of the marriage, and the trustees part with the trust fund upon the joint application of the husband and wife by letter not attested by any witness, the trustees, after the death of the wife, must make good the trust fund for the children. *Hopkins v. Myall*. 86

See SEPARATE ESTATE, 1.

WILL, 7.

#### PRACTICE.

1. To ground an order for the serjeant-at-arms under the 1 *W.* 4. c. 36. s. 15. rule 1. the affidavit must state the party's belief that at the time of suing forth the attachment the Defendant was in the county into which the writ was issued, and not merely that his last known place of residence was in that county. *Handfield v. Wildes*. 91
2. To ground an order for the serjeant-at-arms under the 1 *W.* 4. c. 36. s. 15. rule 1. the affidavit need not state the party's belief that due diligence has been used in ascertaining the Defendant's residence,

sidence, and in endeavouring to apprehend him; but it must swear to those facts, and in some way or other satisfy the Court of their truth. *Wright v. Green.* Page 93

3. The Court will not make an order for the publication of depositions taken in a suit, to perpetuate testimony, while the witnesses are alive. *Barnsdale v. Lowe.* 142

4. After a residuary fund had been paid into the Exchequer, under a decree establishing the right of the Crown, parties setting up a title to the fund were permitted, upon petition in the cause, and with the leave of the Crown, to go before the Master for the purpose of making out their claim. *Monkton v. Attorney-General.* 147

See CONTEMPT, 1.

COSTS, 2.

REFERENCE UNDER 1 W. 4. c. 60.

## PRAYER.

See SPECIFIC PERFORMANCE.

## PRESUMPTIONS.

See PORTIONS, 1, 2, 4, 5.

## PRINCIPAL AND AGENT.

See INTERPLEADER.

## PRINTS.

See INJUNCTION, 1.

## PRIVATE HEARING.

The consent of both parties is not necessary to a private hearing. *Ogle v. Brandling.* 680

## PRIVILEGE.

See CONTEMPT.

## PROVISIONAL ASSIGNEE.

See FORECLOSURE SUIT.

## PRIZE MONEY.

Military prize, when captured, is capable of being effectually assigned by the captor, before any interest in it has been vested in him by a grant from the Crown.

A warrant of the Crown, conveying military prize to trustees upon trust, to collect, recover, and receive the same, and directing the trustees, as soon as the case would admit, to prepare a scheme for the distribution thereof, conformably to certain principles therein stated, and to submit such scheme to the Lords of the Treasury, for the signification of the royal pleasure thereon, is not an absolute or final grant; it creates no vested interest in any particular individuals, as objects of the bounty; nor can persons claiming to be *cestui que trusts* compel a distribution under it by a suit in equity against the trustees.

*Semble*, The Crown may at any time before distribution, alter or revoke a grant of military prize. *Alexander v. The Duke of Wellington.* Page 35

## PUBLICATION.

See PRACTICE, 3.

PUR-

**PURCHASER.***See* **PERFORMANCE.****REAL ESTATE.***See* **CHARITABLE USE, 1.****RECEIVER.**

A receiver appointed by the Court is answerable for the loss of monies consequent on the failure of a banker with whom they have been deposited for security, if the deposit be made in such a way that the receiver parts with the absolute control over the fund.

A receiver paid into a banking house the sums he received, to the joint account of his sureties, under an arrangement with them, that all drafts upon the sums so paid in should be written by one of the sureties, and signed by himself. The bankers having subsequently failed, it was held (reversing the judgment of the Master of the Rolls), that the receiver was liable for the loss. *Salway v. Salway.* Page 215

**REFERENCE UNDER 1 W. c. 60.**

Proper form of the reference under the 1 W. 4. c. 60. *In the Matter of Pigott.* 683

**REHEARING.**

A second rehearing, after the cause has been heard and decided in the Court below, and once reheard on appeal by the Lord Chancellor, is not a matter of right, but an indulgence which the Court will

only grant on a special case made. *Deerhurst v. The Duke of St. Alban's.* Page 702

**REMOTENESS.***See* **WILL, 8, 9, 10, 13.****RENTS.**

The rule of law, that the title to land cannot be tried in an action for money had and received, does not apply to cases where only the pastgone rents of lands are in question.

The widow of a testator, with the acquiescence of his heir, was let into possession of certain freehold houses, under an erroneous supposition that they passed by the will along with other property, in which a life interest was devised to her; and before the error was discovered or her right disputed, she died. On a bill filed by the heir against her personal representative, praying the delivery of title deeds and an account, it was held,

That the suit was maintainable for the rents received during her continuance in possession;

That as the defence of the statute of limitations was not raised upon the pleadings, the account should be taken from the time when the Plaintiff's title first accrued; and,

That the Plaintiff was not at liberty to set off the amount of such rents against payments made by the widow in her character of executrix, those payments being, by

by virtue of a special trust, a primary charge upon the estates, of which, subject to the widow's life interest, the Plaintiff was devisee. *Moncypenny v. Bristow*.  
Page 117

**RENUNCIATION.**

See FRAUD.

**REPUBLICATION.**

See WILL, 2.

**REVERSIONARY INTEREST.**

See BARON AND FEME.

SPECIFIC PERFORMANCE.

**REVOCATION.**

See WILL, 12. 16.

**ROYAL GRANT.**

See PRIZE MONEY.

**SATISFACTION.**

See PORTIONS, 4, 5.

**SCHEDULE.**

See TRUST DEED, 1.

**SCHEME.**

See CHARITABLE USE, 2, 3.

**SECURITY.**

See MORTGAGE.

**SEPARATE ESTATE.**

1. Devise of lands to trustees upon trust, to pay the rents and profits to *J. H.* for life; but if he should attempt to assign the same, or

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should commit an act of bankruptcy, or become insolvent, then upon trust to pay thereout to the wife of *J. H.* an annuity of 100*l.* during his life, and after his decease, an annuity of 30*l.* during her widowhood, and upon certain other trusts, as to the residue for the children of the marriage: Held, first, that the annuity of 100*l.* was not the separate estate of the wife, but passed by the husband's assignment to a purchaser for value; secondly, that as against such purchaser the wife had no equity for a settlement out of the annuity. *Stanton v. Hall*.

Page 175

2. Lands were settled upon trust after the death of the settlor, to sell the same and distribute the proceeds among all the settlor's children *nominatim*; and as to the shares of two who were married women, the trustees were directed to pay the same "into their own proper and respective hands, to and for their own use and benefit;" but in case they should be then dead, to pay their shares to their respective husbands for their own use and benefit: Held, that these shares did not vest in the married women to their separate use. *Tyler v. Lake*. 183

3. On the marriage of a female infant who was a ward of Court, and entitled to a leasehold estate to her separate use, a settlement was made under the order of the Court, giving to the trustees a power of sale over the leasehold

3 E

estate:

estate:— A sale made by the trustees under the power, during the minority of the female infant is not valid. *Simson v. Jones.*

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See **BARON AND FEME**, 1.

### SET OFF.

See **RENTS**.

### SETTLEMENT.

A husband, whose wife was entitled to a fund in Court, signed a memorandum after marriage, agreeing to secure half her property on herself: Held, (reversing the decision of the Court below,) that it was competent for the wife to waive this agreement, and that any benefit which her children might have taken under it was defeated by her waiver. *Fenner v. Taylor.* 190

See **PERFORMANCE**.

**SEPARATE ESTATE**, 1. 3.

### SPECIFIC BEQUEST.

See **WILL**, 11.

### SPECIFIC PERFORMANCE.

In a suit by a purchaser to compel specific performance of a contract for the sale of a reversionary interest in stock, or in the alternative, to have the deposit repaid, the Court having decided against the Plaintiff's right to the principal relief sought, refused the alternative part of the prayer, and dismissed the bill with costs. *Kendall v. Beckett.* 88

### STATUTE OF LIMITATIONS.

See **RENTS**.

### STATUTES.

1. 1 W. 4. c. 42. *Brook v. Smith.* Page 73
2. The eleventh section of the 1 W. 4. c. 47., extended to a case where the decree in the cause was made prior to the act. *Chapman v. Tenant.* 74
3. 1 W. 4. c. 36. s. 15. *Handfield v. Wildes.* 91
4. 1 W. 4. c. 36. s. 15. *Wright v. Green.* 93
5. 9 G. 2. c. 36. *Collinson v. Pater.* 344
6. 53 G. 3. c. 102. *Barton v. Tattersall.* 541
7. 1 W. 4. c. 60. *In re Pigott.* 683

### TENANT FOR LIFE.

See **PERFORMANCE**.

### TITHES.

See **MODUS**.

### TIME OF PAYMENT.

See **WILL**, 11.

### TRUST.

A testatrix devised a customary tenement to *John*, without words limiting the inheritance. Upon her death, the dormant surrenderec, in whom the legal estate was, surrendered the fee to *John*;



*John*; and *John* died more than forty years before the filing of the bill, having surrendered the tenements to purchasers, who had notice of the will of the testatrix: Held, that the equitable title of the heir, which accrued on the death of *John*, was barred by length of time. *Collard v. Hare*.

Page 675

See LORD OF A MANOR.

PRIZE MONEY.

TRUST DEED, 1.

### TRUST DEED.

1. A person by deed conveyed to trustees certain personal property, upon trust to sell the same, and, after satisfying certain specified charges and claims in a prescribed order out of the proceeds, to divide the residue among his scheduled creditors, none of whom were parties or privy to the execution of the deed. The trustees, after partially executing the trusts by making sales and paying off the specified charges and claims in the order directed, concurred with the grantor in doing several acts inconsistent with the subsequent trusts: Held, that after the death of the grantor a scheduled creditor had no equity against the trustees to enforce the execution of the trusts, the conveyance being in the nature of a private arrangement for the personal convenience of the grantor, and vesting no right in the creditors. *Garrard v. Lord Lauderdale*. 451

2. Where consignments have been made from abroad to answer an annuity which the owner of the property consigned is liable to pay, and the consignee in this country gives notice of the arrangement to the annuitant, and makes payments in pursuance of it, the consignee is not afterwards at liberty to discontinue such payments, so long as he has any proceeds of the consignments in his hands.

The circumstances of such a transaction constitute an implied trust, which the Court will enforce against the consignee, for the benefit of the annuitant. *Fitzgerald v. Stewart*. Page 457

### TRUST OF A TERM.

See BARON AND FEME, 2.

### TRUSTEE.

See LIABILITY OF TRUSTEES.

POWER, 2.

RECEIVER.

### UNCERTAINTY.

See WILL, 1.

### VENDOR AND PURCHASER.

Under an agreement of exchange between *A.*, who held lands under a college lease, and *B.*, the owner of an adjoining estate, *B.* occupied part of the college lands, and *A.* had occupied, along with the residue of the leasehold, part of *B.*'s estate.



estate. *A.* having become bankrupt, the college leasehold was sold, and was described in the particulars of sale as "late the residence of *A.*:" Held, that the purchaser was not to be considered as having implied notice of the agreement of exchange, and that he had a right to recover by ejectment that portion of the leasehold which was in *B.*'s occupation. *Miles v. Langley.* Page 626

### VESTED INTEREST.

See WILL, 10.

### VESTING.

See WILL, 15.

### VOLUNTARY CONVEYANCE.

See TRUST DEED, 1.

### WAIVER.

See SETTLEMENT.

### WARD OF COURT.

See SEPARATE ESTATE, 1.

### WIFE'S CONSENT.

See PLEADING, 1.

### WIFE'S EQUITY.

See MARRIAGE SETTLEMENT.  
SEPARATE ESTATE, 1.

### WILL.

1. Conditional bequest, "to the fellows and demies of *Magdalen College, Oxford*," upon the happening

of a particular event, held void for uncertainty; the language of the condition and the description of the legatees being so loose and obscure, that the Court was unable judicially to collect the intention of the testator with respect either to the individuals who were to take, or the time and manner of their taking. *Attorney-General v. Sibthorp.* Page 107

2. Where a codicil in its dispositive part is applicable solely and expressly to the property previously devised by the will, it has not the effect of republishing that will, so as to carry after purchased property, notwithstanding a more general intent indicated in its recital. *Moneyppenny v. Bristow.* 117

3. A testator gives to his mother an annuity for life, and after her decease to his sister, if she be a widow, but not otherwise, but to revert back to his children after her death. At the death of the testator and of the mother, who survived him, the sister was a married woman: Held, that the sister on afterwards becoming a widow was not entitled to the annuity. *Bartleman v. Murchison.* 136

4. A testator directed that one third of his residuary estate should be invested in the purchase of an annuity for the life of a female, who was single at the date of the will and the death of the testator, and this annuity he gave to her separate use, and independent of any husband

husband she might happen to marry, and without power to sell or assign the same by anticipation. The Master of the Rolls, upon the ground that the restraint against alienation or anticipation would be valid in case of future coverture, refused to order payment to the legatee of the price which would be paid for the annuity. But the Lord Chancellor held that she was entitled, if she chose, to the fund at once, without having it laid out, and that this option was not affected by the clause against anticipation. *Woodmeston v. Walker*. Page 197

5. A testatrix gave her real estates upon trust to be sold, and directed the monies to arise from such sale to be considered and taken as part of her personal estate; she then willed, that out of the monies to arise from such sale, and out of all other her personal estate, certain pecuniary legacies should be paid; and bequeathed all the residue of her personal estate, and of the monies arising from the sale of her real estates, upon trust for two persons and their children. Some of the pecuniary legatees having died in the testatrix's lifetime; it was held (reversing the decision of the Court below), that the conversion of the real estate into personal, directed by the will, was not absolute, but partial only, for the purpose of making good the pecuniary legacies; and that such of those legacies as had lapsed, in so far as they consisted

of the produce of real estate, had lapsed for the benefit of the heir at law. *Amphlett v. Parke*.

Page 221

6. Where a testator directed his real and personal estate to be sold, and his debts and legacies to be paid, including certain charitable legacies, and gave the residue of the mixed fund to A. and B., the failure of the charitable legacies was held to enure to the benefit of A. and B. *Green v. Jackson*.

238

7. A testator, having under a settlement a power of appointing by will a sum of 7150*l.* bank stock, in respect of which three bonuses had been paid and invested since the date of the settlement, by his will, after mentioning the original amount of stock, and making an erroneous reference to the first bonus, as then consisting of 715*l.* 5 per cent. stock, appointed the said sum of 7150*l.* bank stock, and the said sum of 715*l.* 5 per cent. bank annuities, "together with all such further additions in the nature of profit to be made to the said bank stock in his lifetime:" Held, that the appointment extended to all the bonuses.

A testator having a power under his marriage settlement to appoint a fund among his children, appointed it to his two sons and three daughters in equal shares, and then declared that the shares appointed to his daughters should be held on the same trusts for the benefit of his daughters and their issue

issue as were therein expressed concerning the shares of his residuary estate bequeathed to each daughter and her issue: under these trusts the daughters took in their respective shares of the residue a life interest to their separate use, but without power of anticipation or alienation: Held,

That the shares of the settled fund were well appointed to the daughters absolutely; but to their separate use during their respective lives, and without power of anticipation or alienation.

That no case of election was raised in favour of the issue of the daughters against the daughters or their husbands. *Carver v. Bowles.* Page 304

8. A gift over of money upon the death of a legatee without issue is void, unless from the words of the will it can be collected that the testator meant a death without issue at the time of the death of the legatee.

A testator gave to his brother 300*l.* per annum during his life, and to each of two nephews 150*l.* during their lives; but if either of the nephews died, the other to inherit the whole 300*l.*; and if the brother died without issue, the two nephews to inherit from the brother: and he then proceeded to state that the reason why he left only the interest to his brother and two nephews was, that, if they died without issue, the money might go to his three cousins, to be divided equally between them:

the brother and nephews all died without issue: Held, that the gift over to the cousins was void, as being too remote. *Lepine v. Ferrard.* Page 378

9. A testator by his will gave to *Caroline*, described as his natural daughter, a sum of stock, and his house and land at *C.*; with a direction that if she married, the property should be settled solely upon herself and children; but, in case of her death without lawful issue, the money so left to her to be equally divided betwixt his nephews and nieces who might be living at the time, and the land at *C.* to his nephew *J. H.*: Held, that *Caroline* took an absolute interest in the stock. *Campbell v. Harding.* 390

10. Where real and personal estates are given together for life, and so limited over that a child of the tenant for life would take a vested interest in the real estate at its birth, and in the personal estate at twenty-one, being a son, or at twenty-one or marriage, being a daughter, and there is a gift over in the event of the tenant for life dying without issue, it is to be intended a dying without such issue as would take by force of the prior limitations.

A testatrix, after bequeathing divers annuities and legacies, and, amongst others, a sum of stock to *M. M.* to vest at twenty-one or marriage, devised and bequeathed a *West India* plantation, and all the residue of her money in the funds,

funds, after payment of the annuities and legacies thereinbefore bequeathed, and also her plate, books, and certain portraits, to *E. G. T.* and *M. T.* for their lives equally; and after the death of either, the whole to the survivor for life; and after the decease of the survivor, then unto such children of *M. T.* as she should by deed or will appoint; and in default of appointment, then the plantation and the residue of the money in the funds to be equally divided among the said children and their heirs; and if but one child, the whole to such child and his or her heirs, the funded property to be an interest vested in them, being sons, at twenty-one, and being daughters, at twenty-one or marriage; but in case *M. T.* should die without issue of her body lawfully begotten, the testatrix devised the plantation equally among all the children of *A. W.* and their heirs; and in case *M. T.* should die without issue as aforesaid, she then bequeathed her said residue of her money in the funds, and all her said plate, books, and portraits, unto *J. M.* for life, and after his decease to his eldest son for ever: but, in case *J. M.* should die under age and without issue, then the said residue of her money in the funds, plate, books, and portraits unto *M. M.* absolutely. All the rest and residue of her estate and effects the testatrix gave and bequeathed unto *E. G. T.* and *M. T.* absolutely.

*M. T.* having survived *E. G. T.* and died without having been married, it was held,

That *J. M.* took a life interest in the funded property;

That *J. M.* took no interest in the plate, books, and portraits, the limitation over of those articles being too remote;

That the stock legacy to *M. M.*, which had lapsed by her death under age and unmarried, passed under the residuary bequest of the funded property, for the benefit of *J. M.*, and did not sink into the general residue. *Malcolm v. Taylor.* Page 416

11. Where freehold, copyhold, and leasehold estates are devised, subject to a general charge for the payment of debts, and the freeholds and leaseholds are subject to mortgages, and there is a descended freehold estate purchased after the will, the general personal estate not specifically bequeathed is first to be applied in payment of simple contract debts as far as it will extend, and the surplus of simple contract debts is to fall proportionally on the freehold, copyhold, and leasehold estates devised; then the specialty debts, including all mortgage debts, are to be satisfied out of the descended freehold estate as far as it will extend; and the surplus of such specialty debts is also to fall proportionally upon the freehold, copyhold, and leasehold estates devised.

Where a testator gives an annuity

nuity to *A.* for life, payable quarterly, the first payment to be made within eighteen months after his death, the annuity does not commence till fifteen months from the death of the testator.

*Semble*, furniture specifically bequeathed ought to contribute to the payment of the debts proportionally with the devised real estates.

Where a testator gives an annuity to *A.* for life, and directs the first payment to be made within one month from his the testator's death, the annuity commences from the death of the testator; and though the first year's payment is to be made at the appointed time, the payment for the second year does not become due till the end of the year.

*Irvin v. Ironmonger.* Page 531

12. Where a testator makes a codicil without professional assistance, his expressions are not to be construed literally and technically, if upon the whole instrument it appears that he meant to use them in a different sense.

A testator by his will devised all his real estates to trustees, upon trust for his son during his life, with remainder to the son's children in strict settlement, and, for default of such issue, to the testator's brother for life, remainder to *Robert* in tail; and he gave the residue of his personal estate to the same trustees, on trust, subject to two annuities, for the children of his son; and failing

them, for his brother for life, and after his death for *Robert* absolutely. The brother died, and the testator afterwards made a codicil, by which, after reciting that in case his son died without an heir male or female, he had bequeathed his estates in the parish of *Missenden* and elsewhere to *Robert*, he revoked that part of his will, and excluded *Robert* from all chance of benefit under the will; and in the place of *Robert*, he, if his son died without heirs male or female, bequeathed all the estates he had or might have at the time of his death in *Missenden* or elsewhere, which by virtue of his will were the sole property of his son, to *Thomas* and the heirs of his body, subject to the same conditions of entail as were imposed on the son; and in case *Thomas* died without heirs, he bequeathed all the estates which *Thomas* would inherit by the death of the testator's son to *Jacob* and his heirs, subject to the payment of the testator's debts and annuities: Held, that the gift of the residue of the personal estate to *Robert* was revoked, and that this residue was not undisposed of, but was given to *Thomas*. *Read v. Backhouse.*

Page 546

13. A testator by his will devises all his real estate to his executors for the purposes thereafter stated; and, after empowering them either to continue his business or to dispose of it, he gives the profits of it in the one case, and the interest

est of the monies arising from the sale in the other, and also the interest of the securities on which the rest of his capital should be invested, to his daughter for life, her receipt to be a discharge. He then gives her the rents and profits of all his real estates during her life; and at her decease he devises and bequeaths to her heirs all his estates real and personal as tenants in common: if his daughter has but one child, such child is to possess the whole; but if she should die without issue, then at her decease he gives certain legacies. He next directs all his goods and effects to be sold, his said legacies to be paid, and a sum invested sufficient to purchase 150*l.* a year, which is to be paid to the husband of the daughter. He then orders his real estates to be sold at the decease of his daughter or at the decease of his brothers and sisters, according as a particular event may turn out; and he gives over to certain persons all the residue of his personal estate, including the proceeds of the sale of the real estates when sold, and the rents of them until they are sold. The daughter died without having had issue: Held,

That the daughter took an estate tail in the freeholds;

That the real and personal estate being given over together, she took the personal estate absolutely;

That the annuities and legacies given at her decease were charged

both on the real and personal estate, and were to be borne proportionally by the two funds. *Dunk v. Fenner.* Page 557

14. The testator, upon the marriage of his daughter *Catherine*, covenanted to make her fortune equal to that of any one of his five other daughters. By his will he gave to *Catherine* absolutely a provision equal to that which he gave to any one of his other five daughters and their issue; but the fortunes bequeathed to these five daughters were limited to them for life only, with remainder to their issue: and in case any one of the five should die without leaving issue, her share was to go to the others of the four daughters and their issue, in the same manner as their original shares. One of the five died without issue; Held, that *Catherine* could not claim an additional provision in respect of the benefits thereby derived by the other four daughters and their issue, her absolute interest in her own share being equivalent in value to the interests of the other daughters and their issue in their respective shares, and their contingent interests in the shares of each other. *Clegg v. Clegg.*

570

15. A testator appoints a fund, after the death of his wife, to his son, to be paid to him at her decease, if he shall then have attained twenty-one; and in case his son dies under twenty-one, and after the wife, he gives the fund to his brother; and

in case the wife shall outlive both the son and the brother, he gives it to the brother's daughters then living. The son attained twenty-one, and died in the lifetime of the wife, who survived both the son and the brother: there were daughters of the brother then living: Held, that the representatives of the son, and not the daughters of the brother, were entitled to the fund. *Chutterbuck v. Edwards.* Page 577

16. A testator by his will gave a specific chattel to *A.* Afterwards, by a codicil, he gave a number of articles of a different kind, and of much less value, to *B.*, and in enumerating those articles, introduced an imperfectly written word, which might be supposed to designate the chattel previously given to *A.*: Held, that the bequest to *A.* was not thereby revoked.

If property described in distinct and unambiguous terms is bequeathed to a particular person, a subsequent bequest of the same property to another must, in order to be effectual, designate the subject-matter of the gift in words so legibly written that no reasonable

doubt can be entertained with respect to them. *Goblet v. Beechey.*

: Page 624

17. A testatrix by a codicil gave to *A.* and *M.* "50*l.* each of bank long annuities now standing in my name." At the date of the codicil and at her death, she possessed long annuities sufficient to answer this bequest specifically, but not also to satisfy certain legacies charged by the other testamentary papers upon the same stock. Evidence as to the state and value of the testatrix's property in the funds at those respective times was admitted; and on the effect of that evidence, and the language of the testamentary papers, taken together, the bequests to *A.* and *M.* were held not to be specific, but pecuniary. *Boys v. Williams.* 689

18. Legacy of "100*l.* long annuities stock" held, upon the context of the will and the terms of the gift as compared with those of the other bequests, and upon the evidence of the state of the funded property, to be pecuniary and not specific. *Attorney-General v. Grote.* 699

See POWER, 1.

END OF THE SECOND VOLUME.





